**Arbah Hotel Corp. d/b/a Meadowlands View Hotel *and* New York Hotel and Motel Trades Council, AFL–CIO.** Cases 22–CA–197658, 22–CA–203130, 22–CA–205317, 22–CA–205422, 22–CA–209158, and 22–CA–212705

November 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On December 20, 2018, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Arbah Hotel Corp. d/b/a Meadowlands View Hotel, North Bergen, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening bargaining unit employees with unilateral discontinuation of their negotiated health insurance coverage if they do not sign up for the Respondent's new health insurance coverage.

(b) Discharging or otherwise discriminating against employees for supporting New York Hotel and Motel

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein. Specifically, we will require the Respondent to make all delinquent contributions to the UNITE HERE Health Fund on behalf of bargaining unit employees that have not been made since October 2017 when the Respondent ceased making its required payments.

In the absence of exceptions, we adopt the judge's findings that the Respondent, through its letter dated September 8, 2017, violated both Sec. 8(a)(1) by threatening to unilaterally discontinue the bargaining unit employees' negotiated health insurance benefit coverage if the employees did not sign up for the Respondent's new health insurance coverage, and Sec. 8(a)(5) and (1) by bypassing the Union and dealing directly with bargaining unit employees. We also adopt, in the absence of exceptions, the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to meet and bargain with the Union since October 15, 2017. Further, because the Respondent did not except to the judge's recommended affirmative bargaining order, we find it unnecessary to provide a justification for that remedy. See *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002); *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 978 (D.C. Cir. 1998); *SKC Electric, Inc.*, 350 NLRB 857, 862 fn. 15 (2007); *Heritage Container, Inc.*, 334 NLRB 455, 455 fn. 4 (2001).

In affirming the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by discharging Marie Dufort, we agree with the judge that the General Counsel established that Dufort's union activity was a motivating factor in her discharge and that the Respondent's asserted justifications for Dufort's discharge are pretextual. We therefore find it unnecessary to proceed to the second step of the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), in which the Board determines whether a respondent has established that it would have discharged the employee even in the absence of her protected activity. That step is only applicable in mixed-motive cases. *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71, slip op. at 3 (2018), enfd. XXX Fed. Appx. XXX (2d Cir. Oct. 25, 2019). We also find it unnecessary to rely on the judge's inapposite citation to *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984), which concerned whether an employee had engaged in concerted activity, not the union activity at issue in this case.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by denying Union Bargaining Representative George Padilla access to the facility, we agree with her finding that the parties' January 27, 2017 settlement agreement did not authorize his exclusion. That agreement stated that "[p]rior to Mr. Padilla returning to the Hotel, the parties shall meet, provided such meeting must take place before February 15, 2017." We agree with the judge that this provision established a deadline for the meeting, which did not occur, rather than a condition precedent to Padilla returning to the hotel. In addition to the reasons stated by the judge, we reject as entirely implausible the Respondent's claim that the Union agreed to a provision that permitted the Respondent to ban Padilla permanently from its facility by simply refusing to meet with the Union.

Finally, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) when it unilaterally failed and refused to make health insurance coverage payments to the UNITE HERE Health Fund by the end of October 2017 for the bargaining unit employees' September 2017 health insurance coverage, resulting in the termination of their health insurance coverage on November 1. The Fund had previously notified the Respondent of its delinquency in payments on October 20 and that a failure to remit the required payments would result in the termination of bargaining unit employees' health insurance coverage.

The Respondent argues that its failure to remit the payments to the UNITE HERE Health Fund was privileged by a February 2012 side letter, which provided that "[s]hould the Hotel find a more affordable health care alternative, the parties agree that the Hotel may change providers, provided such alternative maintains the same if not better level of current benefits, eligibility threshold, and coverage without employee contributions." Even assuming that this side letter was still in force in 2017, it does not support the Respondent's position. By its terms, this side letter permitted the Respondent to change providers only—not, as happened here, to unilaterally cease payments to the UNITE HERE Health Fund so as to cause the outright cancellation of the bargaining unit employees' health insurance. The Respondent fails to cite to any contractual provision or other agreement with the Union that granted it the right to unilaterally cancel the bargaining unit employees' health insurance coverage.

Trades Council, AFL–CIO, or any other labor organization.

(c) Failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(d) Unilaterally changing the practice of permitting official representatives of the Union, including George Padilla, to access the facility pursuant to the terms of the expired collective-bargaining agreement.

(e) Bypassing the Union and dealing directly with bargaining unit employees concerning changes in wages, hours, or other terms and conditions of employment.

(f) Failing and refusing, since October 2017, to make contractually required contributions to the UNITE HERE Health Fund on behalf of bargaining unit employees.

(g) In any like or related matter interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marie Dufort full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Marie Dufort whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Marie Dufort for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Marie Dufort, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(e) Rescind the change in the terms and conditions of employment of its bargaining unit employees implemented on August 24, 2017 by granting the Union's bargaining representative access to the facility.

(f) Make all delinquent contributions to the UNITE HERE Health Fund on behalf of bargaining unit employees that have not been made since October 2017, including any additional amounts due the fund as set forth in the remedy section of the judge's decision.

(g) Make bargaining unit employees whole for any expenses ensuing from its failure to make the required health fund contributions, with interest, as set forth in the remedy section of the judge's decision.

(h) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(j) Within 14 days after service by the Region, post at its North Bergen, New Jersey facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 29, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unilateral discontinuation of your negotiated health insurance coverage if you do not sign up for our new health insurance coverage.

WE WILL NOT discharge or otherwise discriminate against you for supporting New York Hotel and Motel Trades Council, AFL–CIO, or any other labor organization.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT unilaterally change the practice of permitting official representatives of the Union, including George Padilla, to access the facility pursuant to the terms of the expired collective-bargaining agreement.

WE WILL NOT bypass the Union and deal directly with you concerning changes in your wages, hours, or other terms and conditions of employment.

WE WILL NOT fail and refuse to make contractually required contributions to the UNITE HERE Health Fund on your behalf.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Marie Dufort full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Marie Dufort whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Marie Dufort for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Marie Dufort, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL rescind the change in the terms and conditions of employment of our bargaining unit employees implemented on August 24, 2017, by granting the Union's bargaining representative access to our facility.

WE WILL make all delinquent contributions to the UNITE HERE Health Fund on behalf of bargaining unit employees that have not been made since October 2017.

WE WILL make bargaining unit employees whole for any expenses resulting from our failure to make the required health fund contributions, with interest.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

ARBAH HOTEL CORP. D/B/A MEADOWLANDS VIEW HOTEL

The Board's decision can be found at www.nlrb.gov/case/22-CA-197658 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

*Chevella Brown-Maynor, Esq.,* for the General Counsel.
*Robert C. Lorenc, Esq. (The Lorenc Law Firm, P.C.),* for the Respondent.
*Amy Bokerman, Esq.,* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

Lauren Esposito, Administrative Law Judge. This case was tried in Newark, New Jersey, on May 30 and 31, 2018,[1] and on June 20, 21, and 22, 2018. The New York Hotel and Motel Trades Council, AFL–CIO (Charging Party or Union) filed charges and amended charges on April 26, 2017, June 14, 2017, July 26, 2017, August 21, 2017, August 29, 2017, August 31, 2017, November 2, 2017, and January 9, 2018. The Consolidated Complaint issued on April 24, 2018, and was amended by Counsel for the General Counsel (General Counsel) on the record on May 30, 2018. (Tr. 10–11, 13–14; GC Exh. 2.)

The Consolidated Complaint alleges that Arbah Hotel Corp. d/b/a Meadowlands View Hotel (Arbah or Respondent), violated Section 8(a)(1) of the Act by threatening to unilaterally discontinue negotiated health insurance coverage if the employees did not sign up for alternate health insurance coverage. The Complaint further alleges that Arbah violated Sections 8(a)(3) and (1) by discharging Marie Dufort in retaliation for her activities on behalf of the Union. Finally, the Complaint alleges that Arbah violated Sections 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union, unilaterally refusing to remit health insurance coverage payments to the UNITE HERE Health Fund, bypassing the Union and dealing directly with employees, and unilaterally denying the Union's bargaining representative access to the facility.[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by General Counsel, Arbah, and the Union, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Arbah, a corporation with an office and place of business in North Bergen, New Jersey, operates a hotel providing food and lodging. Arbah admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Arbah also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### *A. Background and the Parties*

Arbah operates the Meadowlands View Hotel in North Bergen, New Jersey, providing lodging, food, and related services. Arbah admits and I find that Steve Silverberg and Mark Wysocki are its President and Vice President, respectively, and that Silverberg and Wysocki are supervisors within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13). Arbah also admits and I find that Desiree Ruiz, its assistant operations manager, is a supervisor within the meaning of Section 2(11) and an agent within the meaning of Section 2(13). (Tr. 565–566.) Arbah further admits and I find that four individuals in its housekeeping department—assistant manager Rosa DiCenso, managers Raisa Perez and Paola, and supervisor Jessica—were at all material times statutory supervisors and agents of Respondent. (Tr. 372–373.) During the collective bargaining negotiations at issue herein, Arbah was represented by its attorney Robert Lorenc. (Tr. 77.) Wysocki and Ruiz testified at the hearing, as did Arbah's assistant general manager Vanessa Rubio. (Tr. 529–530.)

The Union is an umbrella organization for several unions representing employees in different job classifications, and negotiates, executes and services collective-bargaining agreements and health insurance providers. (Tr. 516–519.) Richard Maroko and Amy Bokerman are its General Counsel and Associate General Counsel, respectively. (Tr. 77, 405–406.) Sarah Stern was employed by the Union as a Hotel Employee Action Team supervisor from February of 2014 until April 11, 2018, and began working with Arbah's bargaining unit employees as an organizer in May 2015. (Tr. 42, 87, 98.) As an organizer, Stern communicated information between the Union membership, its legal team and the business agent servicing the bargaining unit at Arbah's facility. (Tr. 42–43.) Stern was also a member of the Union's bargaining committee and attended negotiations. (Tr. 43.) George Padilla is a Union business agent responsible for administration and enforcement of the Union's contract with Arbah and was also part of its negotiating team. (Tr. 70–71.) Stern and

[1] On May 31, 2018, the hearing was adjourned at Respondent's request so that Arbah could retain an attorney to represent it. Tr. 244, 245–247, 250–251, 253–255 (it should be noted that the statement beginning on p. 247, line 11 and ending on p. 248, line 20 was made by General Counsel, and was attributed to me in error). The hearing subsequently resumed on June 20, 2018, with Robert Lorenc, Esq. representing Respondent.

[2] The consolidated complaint also alleged that Arbah violated Sections 8(a)(5) and (1) by refusing to provide the Union with information necessary for the Union to perform its duties as exclusive bargaining representative. General Counsel withdrew this allegation in her Post Hearing Brief, because Arbah produced the requested information during the hearing. GC Posthearing Br. at 15.

Bokerman testified at the hearing, as did former employee Marie Dufort, current employee and shop steward or delegate Carmen Suarez, and current employees Yvette Charles and Meleda Coronado.

Since January 19, 2011, Arbah has recognized the Union as the exclusive collective bargaining representative of the following unit of employees:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys, and dishwashers excluding all supervisory personnel.

(Tr. 43–45; GC Exh. 3, p. 2, 15.) During 2017, there were approximately 30 bargaining unit employees working at Arbah's facility. Tr. 45–46, 160. Arbah and the Union were parties to a collective bargaining agreement effective by its terms from July 1, 2011 through June 30, 2015. (Tr. 160–161, 406, GC Exh. 3.) There is no dispute that since June 30, 2015 the parties have continued to apply the terms of the collective-bargaining agreement, even though it has expired. (Tr. 97, 160–161, 491.)

*B. Events Pertaining to the Discharge of Marie Dufort*

Marie Dufort began working at Arbah as a housekeeper on June 15, 1996, and held that position until she was discharged on April 7, 2018. (Tr. 51, 161, 281–282.) The housekeepers at Arbah are responsible for cleaning guest rooms, including dusting and vacuuming, cleaning the bathrooms, and changing linens. (Tr. 279–280, 354, 371–372.) Dufort was a member of the Union throughout her employment at Arbah. (Tr. 280–281.)

Dufort testified that on February 8, 2017,[3] housekeeping supervisor Paola called her to work a shift on February 9 to replace houseman Jesus, who was unable to work that day.[4] (Tr. 285.) Paola stated that Dufort would spend the shift delivering linen from the laundry to the rooms. (Tr. 326–327, 328.) On February 9, Dufort arrived at the hotel 8:10 a.m. but did not punch in, because the shift began at 8:30. (Tr. 191, 286–287, 326.) However, after Dufort arrived, Paola asked what she was doing at the hotel. (Tr. 288–289.) Dufort stated that Paola had called her in to work. (Tr. 289.) However, Paola refused to assign Dufort any work for the shift and told Dufort to go home because there was no work for her that day. (Tr. 171, 290, 328–329.)

While Dufort was leaving, she saw Suarez, who was arriving for her shift. (Tr. 171–172, 288.) Dufort explained the situation to Suarez, and Suarez called Jesus. Jesus confirmed that he had initially told Paola that he would not be able to work that day but had called her later and said that he would in fact come in on February 9. (Tr. 171, 188.) Suarez told Dufort that they should speak to management, because Dufort should not have been called in to work only to be sent home. (Tr. 171.) Suarez also suggested that Dufort call Stern at the Union. (Tr. 171–172, 289.)

Dufort and Suarez then called Stern, and explained the situation to her. (Tr. 46, 106–108, 172, 290–291.) During this phone call, Dufort also told Stern about an incident on December 23, 2016 when she had discovered a significant amount of marijuana in a room she was assigned to clean. (Tr. 296, 198.) Dufort told Stern that when she reported the marijuana to supervisor Raisa, Raisa yelled at her and treated her in a disrespectful manner. (Tr. 47, 95–96.) Stern said that she would schedule a meeting with Wysocki and his staff to address both issues. (Tr. 291–292.)

On February 13, Stern sent Ruiz an e-mail requesting information regarding both the February 9 call-in incident and the December 23, 2016 incident involving Dufort's discovery of marijuana in one of her assigned rooms. (Tr. 47–48; GC Exh. 4.) Ruiz stated in response that she would arrange a meeting with Dufort and Suarez to discuss the issues without a Union representative present, and did not respond to the request for information. (Tr. 49.)

Despite Stern's e-mail, Dufort and Suarez proceeded to meet with Wysocki, Paola, and Raisa, together with Rubio and Ruiz. (Tr. 172, 289, 291.) During this meeting, Wysocki offered Dufort four hours' pay in order to resolve the issue. (Tr. 173, 289.) Dufort took the position that she should be paid for an entire 8-hour shift, but Wysocki refused to do so on the grounds that Dufort had not punched in. (Tr. 173, 289.) According to Suarez, Wysocki would not permit Dufort to speak, and stated that the collective bargaining agreement did not require that she be paid anything at all. (Tr. 173.) Dufort refused to accept the four hours' pay because she believed based on past practice at the hotel that she should be paid for an entire 8-hour shift if she was called in to work. (Tr. 333–334.) Dufort testified that at or around the time of this meeting, Wysocki told her that he did not want the Union involved, because "when the Union comes, things get ugly." (Tr. 296.)

On February 23, Ruiz told Stern that a meeting had taken place with Dufort, Suarez, and Arbah management. (Tr. 49.) Ruiz told Stern that during the meeting they discussed the issues raised by the Union in its February 13 e-mail and offered Dufort 4 hours' pay to resolve the scheduling issue. (Tr. 49.) Ruiz asked Stern whether the Union was interested in a follow-up meeting. (Tr. 49.) A few days later, Stern spoke to Dufort, who said that she was very upset and felt misled by Arbah, because she believed that a Union representative would be present at the meeting. (Tr. 49–50.) Dufort said that during the meeting, Wysocki asked her why she was always going to the Union with issues, instead of coming to him directly. (Tr. 50.)

On February 26 or 27, another meeting took place regarding the February 9 call-in issue. Dufort was present at this meeting, and her son attended in order to translate for her.[5] (Tr. 173.) Stern and union representative Nicholas were also present, as were Wysocki, Paola, Raisa, Ruiz and other management staff. (Tr. 173–174, 293.) Dufort wanted Wysocki to apologize for the way he had treated her. (Tr. 174.) Wysocki offered to compensate Dufort for her time in coming to the facility but took the position that because Dufort did not punch in she could not be paid for the entire shift. (Tr. 193.) Nicholas and Wysocki proceeded to argue, and no agreement was reached. (Tr. 174, 194.)

In mid-March, a new housekeeping supervisor named Jessica began working at Arbah. (Tr. 51, 299, 303–304.) Dufort testified that at that time Jessica, Paola, and Raisa followed her as

[3] All subsequent dates are in 2017 unless otherwise indicated.

[4] Employees are called in seniority order as additional shifts that become available. Tr. 108–109, 322–325.

[5] Dufort testified at the hearing with a Haitian Creole interpreter. Dufort testified that she can understand spoken English but does not speak it herself. Tr. 308.

she performed her work.[6] Dufort testified that Jessica in particular used her phone to take pictures of and videotape Dufort. (Tr. 299–300, 304, 337.) Dufort stated that although housekeeping supervisors always checked the rooms after the housekeepers cleaned them, she had never previously seen or heard of three supervisors checking the rooms of a single housekeeper. (Tr. 338, 339.)

On March 15, Dufort had a conversation with Jessica while she was cleaning one of her assigned rooms. Dufort testified that Jessica told her that there was a stain on the bedspread or comforter in the room, and asked Dufort to change it. (Tr. 304.) Dufort testified that she called one of the employees responsible for delivering linen and changed the comforter. (Tr. 304.) After Dufort changed the comforter, Jessica asked her whether she had changed it or flipped it over, and Dufort said that she had changed the stained comforter. (Tr. 304.) The next day, March 16, Jessica approached Dufort, and again asked her whether she had changed or flipped the stained comforter. (Tr. 305.) Dufort stated again that she had changed the comforter. (Tr. 305.) Nevertheless, Jessica told Dufort that she wanted her to change the comforter again, and Dufort called the laundry employee to bring a new comforter so that she could do so. (Tr. 305.) Dufort testified that during this conversation, Jessica told her that Wysocki "asked me to do it. He asked me to follow you wherever [you] go because [you] complained to the Union." (Tr. 305.) Jessica further told Dufort that Wysocki wanted to "get rid of" her because she "complained to the Union." (Tr. 305, 308.) Dufort then went to the room in question and changed the comforter. (Tr. 305–306.)

On March 16, while Suarez and Ruiz were discussing unrelated employee write-ups, Ruiz mentioned the previous day's incident involving Dufort, Jessica, and the comforters. (Tr. 161, 196.) Ruiz told Suarez that Dufort had not changed the comforter after Jessica found the stain and directed her to do so. (Tr. 161, 196.) Suarez then spoke to Dufort, who took Suarez to the room in question and showed her that the bedding did not have any stains on it. (Tr. 161–162, 196–197, 202–203.) Suarez called Raisa and Paola, who went to the room. (Tr. 162.) After looking at the bedding, Raisa and Paola told Suarez that they would investigate, because they were sure that there had been a stain on the comforter. (Tr. 162.)

Wysocki then spoke to Suarez in a guest room where she was working with Raisa. (Tr. 164.) Wysocki told Suarez that Dufort's failure to change the bedding was not acceptable because given the potential for complaints on the internet, and that the hotel could not continue using stained bedding. (Tr. 165.) Wysocki initially told Suarez that he intended to discharge Dufort because she "had violated an article of honesty." (Tr. 165.) Suarez told Wysocki that he should not discharge Dufort, because Dufort was a good worker and colleague. (Tr. 165.) Wysocki left the room but returned a few moments later and told Suarez that instead of discharging Dufort he was going to give her a written warning and suspend her. (Tr. 166, 168, 201.) Wysocki told Suarez that none of the housekeepers should use stained bedding in the future. (Tr. 166, 168.) Suarez then attempted to tell Wysocki about the housekeepers' long-standing practice of placing a bed sheet on top of a stained blanket. (Tr. 166.) Wysocki cut Suarez off, saying that this could not continue to happen and he didn't want to hear about it. (Tr. 166–167.)

At 4:30 p.m., after the housekeepers' shift ended, Raisa called together Suarez, Dufort, and Ramon, the head of maintenance. Tr. 167. Raisa read two documents entitled "Discipline Notice" to Dufort, both dated March 17, and asked her to sign them. (Tr. 167, 308, 343-344; GC Exh. 19.) One of these notices was characterized as a "Verbal Warning" and stated that Dufort had committed "negligence and insubordination" by failing to replace a stained comforter with a clean comforter, despite instructions from her supervisor. (GC Exh. 19.) This notice stated that "Photos have been taken and will be saved for referencing" in connection with the incident. Id. This notice also states, **"Progressive action: Verbal Warning, Written Warning #1 is a second warning, Written Warning #2 will result in 2-day suspension. Written warning #3 will result in termination."** Id. (emphasis in original). The second notice was characterized as "Insubordination/Dishonesty," and stated that Dufort had entered the room to change the stained comforter without authorization, and falsely told Suarez that she had changed the comforter the previous day. (GC Exh. 19.) The second notice stated, "Please be reminded that photos were taken on March 15, 2017 with the three supervisors and Desiree Ruiz present." Id. This notice states as follows:

> **Please be advised that this notice could change into a dismissal notice based on further investigation of your insubordination and dishonesty, according to Article XI in the Agreement between the Union and the Hotel.** [7]
>
> **Progressive Action: Verbal Warning, Written Warning #1 is a second warning, Written Warning #2 will result in 2-day suspension. Written warning #3 will result in termination." Id. (emphasis in original).**

Dufort and Suarez refused to sign the warnings, stating that they did not agree with them, so Ramon signed as a witness. (Tr. 167–168, 308–309, 343–344.) Dufort also said that she intended to call the Union. (Tr. 168.) Suarez then called Stern from the locker room used by the housekeepers, and gave Stern Dufort's phone number. (Tr. 168.) Suarez described the stained comforter incident to Stern, and explained that Respondent had

[6] Jessica, Paola and Raisa did not testify at the hearing.

[7] Article XI of the collective bargaining agreement states:

> The Employer may summarily discharge any employee for dishonesty, insobriety, insubordination and/or manipulation of funds with intent to defraud the Employer and/or the customer and physical fighting on the premises in or about the Employer's property and for any other just cause. The Shop Steward or delegate of the particular department shall be present at the time of said removal and the reason of the removal shall be furnished to him. Discharges and disciplinary action shall constitute cases which come under the method of settling grievances herein provided, and shall be subject to arbitration, upon the demand of the Union only if not amicably adjusted. All claims for unjustifiable discharges must be takes [sic] up by either party not later than five (5) working days afte rht date of discharge, or such claims shall be deemed to have been waived.

(GC Exh. 3, p. 6.)

issued written warnings accusing Dufort of lying because she had not in fact changed the comforter. Tr. 168.

Dufort contacted Stern on March 16 or 17, and told Stern that she had received two disciplinary forms regarding the stained comforter cover. (Tr. 50, 309–310.) Dufort told Stern that the housekeeping supervisor had claimed there was a stained comforter cover in one of her rooms, and that even though Dufort had changed the comforter cover she received two written warnings the next day. (Tr. 50–51.) Dufort further told Stern that all of the housekeepers flipped over stained comforters as a general practice, but only she had been disciplined for allegedly doing so. (Tr. 310.) Dufort told Stern that during her 21 years of employment as a housekeeper she had received "hardly any" discipline and had never received two warnings based on the same incident. (Tr. 51.) Dufort also reported to Stern that Jessica, who had begun working only days earlier, had been checking on her with unprecedented frequency, between 3 and 5 times a day. (Tr. 51–52.) On March 21, Stern sent Ruiz an e-mail protesting the discipline issued to Dufort, requesting a meeting with a union business agent present to discuss the matter, and requesting information pertinent to Dufort's alleged misconduct. (Tr. 52–53; GC Exh. 5.) Arbah never responded to Stern's March 21 e-mail, and no meeting ever took place. (Tr. 53, 311.)

Dufort worked for a couple of days after the speaking with Stern. (Tr. 169.) During that time, Wysocki called Suarez to his office, with Raisa present to translate. (Tr. 169.) Wysocki told Suarez that he was very upset and was going to fire Dufort because she had refused to sign the written warnings and had called the Union. (Tr. 169.) Suarez told Wysocki that he should do whatever he needed to do. (Tr. 169.) Subsequently Raisa told Suarez that Wysocki was going to have another meeting with Dufort, but no meeting was ever scheduled. (Tr. 169–170.)

Dufort was then injured in an accident and went on leave. When she returned to work in early April, she was informed that she had been discharged via a letter sent to her by mail. (Tr. 170, 310.) On April 7, Dufort called Stern and told her that when she arrived at work, she had been told by the supervisor that she was discharged and would receive a letter in the mail. (Tr. 54.) This letter, dated April 4, states that Dufort was being discharged for insubordination and dishonesty based upon the events of mid-March 2017, and contains a Dismissal Notice as follows:

> This letter confirms the Employer's decision to provide you with a dismissal notice "based on further investigation of your insubordination and dishonesty, according to Article XI in the Agreement between the Union and Hotel," stated in the disciplinary notice you received on March 17, 2017. During this investigation, it was captured on surveillance that you entered room 426 on March 16, 2017 on more than one occasion without permission or approval from your immediate supervisors in order to manipulate findings of your improper cleaning duties during the previous day.
>
> As a reminder, you were advised to remove the dirty quilt and replace it with a clean quilt on March 15, 2016 [sic]. Your refusal of fulfilling your duties is proven to be an act of insubordination. In addition, you were dishonest by lying to your Shop Steward and accused the Supervisors of making false accusations, which you later admitted to the act of flipping the quilt to hide the stain. As proven in previous instances, regarding lack of proper cleaning, your actions put the Hotel at risk of guest compensation, third party refunds, lack of repetitive business, and bad reviews with attached photos via the Internet. In addition, such insubordination and dishonesty will result in profitability issues and loss of business.
>
> According to Article XI, "The Employer may summarily discharge any employee for dishonesty, insobriety, insubordination…" As a result of your actions, it is with regret that we herewith notify you of the termination of your employment with Arbah Hotel Corp. DBA Meadowlands View Hotel. The termination of your employment is effective Tuesday, April 4, 2017.

(GC Exh. 20.)

On April 12, Stern sent an email to Ruiz, with a copy to Wysocki and Rubio, stating that the Union was filing a grievance regarding Dufort's discharge. (Tr. 54; GC Exh. 6.) This email further requested documents regarding Dufort's employment and termination. (Tr. 54; GC Exh. 6.) In addition, Stern renewed the Union's request for information, initially requested on February 13 but never provided, regarding the February 9 call-in incident and the December 23, 2016 incident involving Dufort's discovery of marijuana in a guest room. (GC Exhs. 4, 6.)

A grievance meeting regarding Dufort's discharge took place at the hotel on May 9. Stern, Maroko, Assistant General Counsel Gideon Martin, and Suarez attended for the Union, while Wysocki, Ruiz, Rubio, and housekeeping supervisors Raisa and Paola attended for Arbah. (Tr. 55.) The Union took the position that Dufort had been discharged in retaliation for contacting Stern and raising grievances. (Tr. 57.) The Union further contended that Dufort had been discharged for following the established practice at the hotel—to flip over stained comforters—even though the housekeeping employees had done so for years without ever being disciplined. (Tr. 57.) The Union also raised concerns that Arbah had been attempting to exclude it from the grievance process, despite the parties' past practice.[8] (Tr. 57–

[8] In her April e-mails regarding Dufort's grievance and the information request, Stern disputed Respondent's interpretation of the grievance procedure. GC Exh. 8. Article XXVI, Section C of the parties' collective bargaining agreement provides as follows:

> Filing of Grievances: Grievances under the terms and conditions of the contract shall be initiated by filing a statement thereof. The grievance shall be initially discussed between the Employer, the Shop Steward, and the employee involved in an attempt to settle same. Any appeals from the decision of the Employer must be taken in writing within ten (10) working days from the day of the notice of the decision. If not so taken, the grievance shall be deemed settled on the basis for the decision made by the Employer and shall not be eligible for further processing.

Stern testified that despite this language the parties had a long-established practice where union representatives other than shop stewards became directly involved in grievances at their inception. Tr. 97–98. In addition, Suarez, the shop steward or delegate, testified that about 3 to 4 years previously she had been prohibited from going to the management offices without an appointment and issued a written warning on that

58.) The Union stated that it intended to file unfair labor practice charges regarding Dufort's discharge, but remained interested in reaching a settlement with Arbah regarding the issue. (Tr. 58.)

According to Stern, Wysocki responded that he "had hoped to settle the case," but was not sure that was possible because "the Union had put him up against the wall by filing charges." (Tr. 58.) With respect to the actual grounds for Dufort's discharge, Wysocki said that Dufort had been "dishonest." Tr. 58. However, according to Stern, Wysocki said that Dufort's "raising all of these issues had cost the employer a lot of time and money and personnel time. And that was a big deal for them."[9] (Tr. 58–59.) At the end of the meeting, Arbah was considering the Union's request to attempt to settle Dufort's discharge, and was to contact the Union with respect to that issue. (Tr. 59.)

Arbah did not contact the Union regarding a possible settlement of Dufort's discharge after the May 9 grievance meeting, so on June 14, Stern sent an e-mail to Wysocki asking whether Respondent had any proposal. (Tr. 67–69; GC Exh. 11.) Ruiz responded the next day, stating that the unfair labor practice case regarding Dufort's discharge was being investigated, and that Arbah would "keep [the Union] posted regarding the outcome of the case." (Tr. 68–69; GC Exh. 11.)

### *C. Events Pertaining to Collective Bargaining Negotiations and the Union's Bargaining Representative*

As discussed above, the most recent collective-bargaining agreement between Arbah and the Union was effective by its terms from July 1, 2011, through June 30, 2015. Negotiations for a successor collective bargaining agreement began on May 4, 2015. (Tr. 470.) Wysocki testified that he became directly involved in negotiations in around September 2015. (Tr. 643.) Overall, there were approximately 6 negotiating sessions in 2015, 2 negotiating sessions in 2016, and 3 negotiating sessions in 2017. (Tr. 470–471.) The last negotiating session took place on August 30. (Tr. 471.)

The collective-bargaining agreement addresses Union visitation of Arbah's premises. Specifically, Article XX states as follows:

> Visitation: Official representatives of the Union shall, upon giving notice in advance to management, be admitted to the Employer's premises at all times as may be necessary to observe the working conditions existing in the operation of the Employer in connection with the performance of this contract, provided said inspection does not interfere with the operation of the Employer's establishment.

(GC Exh. 3.) Despite this language, the testimony at the hearing established that union representatives routinely visited Arbah without providing advance notice to management. For example, Stern testified that she and Padilla visited employees on Arbah's premises without providing notice to Respondent. (Tr. 76.) Stern testified that she visited Arbah between one and three times per month, sometimes for formal meetings during an employee lunch breaks, and sometimes to speak with employees informally. (Tr. 92–94.) Stern testified that she spoke with bargaining unit employees throughout the hotel's premises, so long as their interaction did not interfere with the employees' work. (Tr. 92–94.) Stern understood that Union representatives visited the premises without advance notice for some time, and that Arbah had never raised any objection. (Tr. 100–102, 104–105.) Ruiz similarly testified that Union representatives had visited Arbah's premises without providing advance notice. (Tr. 566–567.)

For several years, George Padilla had been the Union's business agent assigned to service its contract and bargaining unit at Arbah.[10] Tr. 71. On August 2, 2016, Wysocki wrote a letter to Union President Peter Ward, stating that because of Padilla's behavior at a grievance meeting he would no longer be permitted on Respondent's premises. (Tr. 148–150; GC Exh. 15.) Wysocki stated that if Padilla appeared on the premises law enforcement would be called to remove him. (GC Exh. 15.) Subsequently, the Union filed unfair labor practice charges regarding Arbah's denial of access to Padilla.[11] (Tr. 72.) These charges were resolved in a settlement agreement between Arbah and the Union dated January 27. (Tr. 72–73; GC Exh. 12.) The portion of this settlement agreement regarding Padilla's visiting the hotel states as follows:

> 3. The Employer will not bar any Union representatives from the Hotel nor interfere with their access pursuant to the expired CBA. Prior to Mr. Padilla returning to the Hotel, the parties shall meet, provided such meeting must take place before February 15, 2017.

(Tr. 73, 442–443; GC Exh. 12.) The meeting referred to in this settlement agreement never took place. (Tr. 74, 699–700.) The Union's understanding was that the settlement agreement resolved any issues with Padilla and that Padilla would no longer be barred from access to the hotel. (Tr. 74, 75, 152–153, 442–443.) Stern testified that she and the union delegate at Arbah continued to discuss grievances with Padilla, and the employees remained in contact with him. (Tr. 74.) Indeed, Stern testified that the bargaining unit employees continued to specifically ask that Padilla represent them as their business agent. (Tr. 78.) However, Stern stated that some members of the management team preferred that Padilla did not visit the hotel, and thus Padilla visited less frequently in order to "keep peace with the employer." (Tr. 74–75.)

Despite the January 27 settlement agreement, on March 29, Wysocki wrote to Ward, stating that because the Union had failed to respond to letters or e-mails sent on August 2, 2016, and March 8, 2017,[12] "pertaining [to] unprofessional behavior of the

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basis. Tr. 229–230. As a result, since then she had contacted business agent George Padilla to initiate the grievance process, instead of approaching Arbah's management directly. Tr. 230.

[9] Although Wysocki, Rubio, and Ruiz testified at the hearing, none of them were questioned regarding this meeting.

[10] Stern testified without contradiction that Padilla had been the business agent assigned to Arbah prior to the negotiations which began in May 2015. Tr. 71.

[11] Stern and Bokerman both testified that Arbah did not request bargaining regarding the Union's assignment of Padilla to the Arbah bargaining unit prior to Wysocki's August 2, 2016 letter barring him from the facility. Tr. 149, 440–441. The charges also apparently alleged that Arbah violated the collective bargaining agreement by failing to pay for health insurance. GC Exh. 12.

[12] This letter apparently did not involve Padilla. Tr. 150–151.

Union representatives," "from now on all of the meetings with the Union representatives will be video recorded for future reference." (Tr. 149–153.) Stern responded on April 13, stating that the Union was prepared to meet and discuss the issues raised in Wysocki's March 8 e-mail, but that the matters addressed in his August 2, 2016 letter had been resolved by the settlement agreement. (Tr. 154; GC Exh. 17.)

Sometime late in the summer, Padilla visited the hotel and spoke to Wysocki. Rubio testified that she was working in the housekeeping department when she saw Padilla, who told her that he had stopped by to see the Union members and asked to speak to Wysocki. (Tr. 544–545.) Rubio told Padilla that Wysocki was in the meeting room or in the second floor office. (Tr. 545.) At some point, Rubio went upstairs, and saw Wysocki and Padilla speaking outside the meeting room. (Tr. 545–546.) Rubio did not hear everything that was said, but heard Wysocki tell Padilla more than once, "you're in violation to come here…you shouldn't be here." (Tr. 546.) Padilla then left. (Tr. 546.) Rubio testified that this occurred in either July or the beginning of August of 2017. (Tr. 551–552.) Wysocki also discussed this incident during his testimony. Wysocki stated that Rubio came into the meeting room and told him that Padilla was on the premises, and that he saw Padilla in the hall as they left. (Tr. 672.) Wysocki stated that he asked Padilla why he came without calling, and Padilla attempted to talk to him, "kind of pushy." (Tr. 672.) Wysocki testified that he told Padilla that he was busy and could not talk and asked him to leave. (Tr. 672.) Wysocki stated that the incident occurred in August but could not recall whether it took place a couple of days before the August 23 bargaining session, or between that session and the session on August 30. (Tr. 678.) Bokerman stated that Padilla's calendar contained entries for visits to Arbah on August 9 and August 23. (Tr. 561–563.) Wysocki could not recall any discussions with the Union regarding Padilla's behavior after this incident, and Bokerman testified that it was never raised with the Union. (Tr. 444, 680.)

On August 23, the parties met at the Union's offices for a bargaining session. (Tr. 76–77, 432–434.) Maroko, Bokerman, Stern, Padilla, and another staff member in the Union's legal department were present for the Union, and Wysocki, Ruiz and Lorenc were present for the employer. (Tr. 77, 433–434.) Stern and Bokerman both testified that Padilla actively participated in this meeting, discussing health insurance and pending grievances. (Tr. 77, 440.) Arbah did not object in any way to Padilla's participation in the meeting, or object to Padilla serving as a union representative. (Tr. 77–78, 440, 680.)

On August 24, Wysocki, through Ruiz, sent Stern an e-mail stating that Arbah would not recognize Padilla as the Union's business agent, and that law enforcement would be contacted to remove Padilla if he came on the premises. (Tr. 75–76, 85, 443–444; GC Exh. 13, 31.) In this letter, Wysocki again refers to his August 2, 2016 and March 8 letters, contending that Ward "ignored" them. (GC Exh. 13, 31.) Arbah did not request bargaining or otherwise discuss Padilla's behavior with the Union prior to its August 24 letter to Stern. (Tr. 77–78, 440, 444, 680.)

On September 27, Bokerman sent an e-mail to Ruiz, asking for dates to resume collective bargaining negotiations, but Arbah did not respond. (Tr. 471–473; GC Exh. 37.) Bokerman wrote to Ruiz again on October 5, asking her to provide additional dates for contract negotiations. (Tr. 473–474; GC Exh. 37.) Ruiz stated in response that Wysocki was working on the management team's schedule and would provide dates for further negotiations at the beginning of the next week. (Tr. 474; GC Exh. 37.) When Bokerman did not receive any further information, she wrote to Ruiz again on October 16 asking for an update, and on October 27, stating "Please provide dates to meet as soon as possible." (Tr. 474–475; GC Exh. 37.) Still hearing nothing, Bokerman wrote to Ruiz again on November 6, describing their previous correspondence and asking again for dates to resume contract negotiations. (Tr. 475; GC Exh. 37.) Arbah did not respond, so Bokerman wrote to Ruiz again on November 15 and November 29, asking for additional bargaining dates. (Tr. 475–476; GC Exh. 37.) Arbah never responded to Bokerman's e-mails, and never explained its lack of response to the Union. (Tr. 476.)

Sometime in 2017, Arbah filed an action in the United States District Court for the District of New Jersey against the Union. (Tr. 673–674.) Wysocki testified that the purpose of the lawsuit was to compel the Union to permit Arbah to implement an alternative health plan. (Tr. 691, 707.) Arbah is represented in connection with the lawsuit by Michael Farhi, Esq. (Tr. 707; GC Exh. 38.) Settlement discussions conducted in the context of the federal litigation have also involved issues addressed in the collective bargaining agreement, at the behest of the federal judge involved. (Tr. 673–676, 707–708; GC Exh. 38.) However, in an April 11, 2018 email to Bokerman, Farhi represented that, "the discussions have been settlement negotiations to resolve the pending lawsuit and have always been framed that way," because "[t]hat is what the judge hearing this case has ordered." (GC Exh. 38.) Farhi stated that he and his colleague representing Arbah in connection with the federal litigation "have no authority to collectively bargain for a new agreement." (GC Exh. 38.)

### *D. Events Pertaining to the Failure to Make Health Fund Contributions and Respondent's September 8 Letter to the Bargaining Unit Employees*

The collective-bargaining agreement in effect from July 1, 2011 through June 30, 2015 required Arbah to make contributions to UNITE HERE Health (the Fund). (Tr. 406–407; GC Exh. 3.) Article XIV of the contract requires that Arbah make contributions at specified rates for all bargaining unit employees who have not voluntarily waived coverage. (GC Exh. 3, p. 7–8.) At the time that the contract was executed, UNITE HERE Health had only established contribution rates for 2012. (GC Exh. 3, p. 7.) Pursuant to the terms of the contract, Arbah and the Union agree to be bound by the UNITE HERE Health Trust Agreement, and all procedures established thereunder. (GC Exh. 3, p. 7.) Section 5 of Article XIV provides that "The parties agree and understand that, if the appropriate welfare contribution rates are not paid, the Trustees of the Fund may eliminate benefits to otherwise eligible participants and terminate the Employer's participation pursuant to paragraph I.I. of the Fund's Minimum Standards." (GC Exh. 3, p. 8; Tr. 408–409.) Thus, if Arbah failed to make the required contributions, coverage would terminate and the employees would lose health insurance. (Tr. 408–409, 414–415.)

Bokerman testified that her responsibilities as Associate General Counsel for the Union include matters involving the Fund. (Tr. 412–413.) Bokerman testified that the Fund generally requires contributing parties to have a current collective bargaining agreement in effect. (Tr. 411, 413–414.) Before initiating healthcare coverage, the Fund is provided with a copy of the pertinent collective bargaining agreement to determine whether it meets the Fund's minimum standards. (Tr. 413–414.) If there is no collective bargaining agreement in effect, the Fund allows the employer and the Union 12 months to negotiate an acceptable contract meeting its minimum funding standards. (Tr. 414.) Parties can also request a variance, or an extension agreement meeting the Fund's minimum standards. (Tr. 414.)

Pursuant to Article XIV of the collective-bargaining agreement, contributions to the Fund must be remitted by the 15th of the month following the month for which health insurance coverage was provided; i.e., an employer's contribution for the month of June would be due by July 15. (Tr. 407–408; see also GC Exh. 3, p. 8.) Bokerman testified that when an employer is delinquent in its contributions, the Fund sends the employer a letter containing a notice of a possible loss of coverage, and often contacts the Union to let them know about the delinquency as well. (Tr. 413.)

Because the Fund had not released its stated contribution rates for 2013 and 2014, sometime in February 2012 the parties negotiated a side-letter addressing this issue. (R.S. Ex. 2, p. 16.) In this side-letter, the parties agreed that in the event the 2013 contribution rates established by the Fund exceeded twenty percent of the 2012 rates, Arbah would not be required to pay the July 1, 2013 wage increases required pursuant to Article IV of the collective-bargaining agreement. (R.S. Exh. 2, p. 16.) The parties also agreed in that event "to reopen the CBA, to meet and discuss whether they mutually desire to modify it, in whole or in part." (R.S. Exh. 2, p. 16.) The side-letter further states that "Should the Hotel find a more affordable health care alternative, the parties agree that the Hotel may change providers, provided such alternative maintains the same if not better level of current benefits, eligibility threshold, and coverage without employee contributions." (R.S. Ex. 2, p. 16.) Finally, the side-letter stated that "Any and all disputes between the parties or regarding the interpretation or application of this Agreement shall be submitted to arbitration" pursuant to the collective bargaining agreement. (R.S. Exh. 2, p. 16.)

Desiree Ruiz testified that she began working with insurance brokers to obtain a health insurance plan for the bargaining unit employees to replace the coverage provided by the Fund in 2015, after the contract's expiration. (Tr. 587–588). Ruiz testified that she was told at that time to obtain rate quotes for health benefits for the bargaining unit employees. (Tr. 588.) Ruiz was told by the insurance brokers that in order to find an appropriate plan she needed to obtain census data (Social Security numbers, dates of birth, and addresses) for every potential participant, including the bargaining unit employees' dependents. (Tr. 588.) Ruiz attempted to obtain the information from the Fund and the Union, and eventually the Union agreed to allow Arbah to obtain the information directly from the bargaining unit employees. (Tr. 588–591, 593–594.) Ruiz was then able to obtain quotes from brokers. (Tr. 594–595.)

The parties' January 27 agreement settling the then-pending unfair labor practice charges also addresses Arbah's contributions to the Fund. (Tr. 409–410; GC Exh. 12.) In that agreement, Arbah agreed to pay $190,860.96 for all contributions owed during calendar 2016, and the Fund agreed to waive any claims for liquidated damages and interest. (GC Exh. 12, ¶ 1.) In addition, Paragraph 2 of the January 27 agreement states "The Hotel agrees to make contributions to the Fund pursuant to the terms of the expired CBA at rates determined by the Fund in accordance therewith." (GC Exh. 12.)

Subsequent to the January 27 agreement, however, Arbah became consistently delinquent in its contribution to the Fund. (Tr. 416.) As a result, the Fund sent Arbah letters after the 15th of the month in March, April, May, June, and July and on August 21, stating that Arbah had not made its required contributions and was delinquent. (Tr. 415–425; GC Exhs. 21, 22, 23, 24, 25, 26.) Each of these letters informed Arbah that if the required contribution was not made, Arbah would be subject to termination from participation in the Fund effective at the end of the month, and that if termination occurred bargaining unit employees would no longer be eligible for benefits. (GC Exhs. 21, 22, 23, 24, 25, 26.) Some of these letters stated, **"in order to avoid a termination and a gap in your employees' coverage, you must submit your…payment immediately."** (GC Exh. 24, 25) (emphasis in original). Each month, Arbah paid the delinquent contributions, and the bargaining unit employees' health coverage continued. (Tr. 417, 418, 420, 421, 423.) The Funds' August 21 letter stated that in addition to Arbah's delinquency for that month, the 12-month period to enter into an acceptable successor contract had expired. (Tr. 424; GC Exh. 26.) As a result, the parties needed to submit a finalized collective bargaining agreement, request a variance or extension of time to continue negotiating, or execute an extension agreement. (Tr. 424; GC Exh. 26.)

After receiving the August 21 letter from the Fund, the Union requested a variance in order to ensure that the bargaining unit employees' health insurance continued while a new contract was being negotiated. (Tr. 425.) On August 22, Bokerman sent an e-mail to Scott Mathson of the Fund requsting that the Trustees approve an extension of time to negotiate a renewal contract with Arbah. (Tr. 425–426; GC Exh. 27.) Later that day, Stern informed Bokerman that Arbah was distributing information to the bargaining unit employees regarding a new health plan, and encouraging them to sign up. (Tr. 428–429.) Bokerman called Lorenc, who told her that Arbah had found alternative coverage after learning via the Fund's August 21 letter that the Fund intended to terminate its coverage at the end of the month. (Tr. 429.) Because there had not been any negotiations regarding Arbah's proposed alternative health plan, Bokerman asked Lorenc to send the Union plan documents and specific information. (Tr. 429–430.) Lorenc said he did not have anything, but would try to provide some information before the negotiating session scheduled for the next day. (Tr. 430.) On August 23, Lorenc sent Mathson an e-mail stating that Arbah did not wish to

proceed with the extension requested by the Union.[13] (Tr. 427–428, 431; GC Exh. 28.) Lorenc stated that because the Fund's August 21 letter stated that it was terminating coverage, Arbah "procured comparable coverage for its employees," so that an extension was not necessary. (GC Exh. 28.) Later in the afternoon of August 23, the Fund sent an e-mail to Bokerman, Lorenc, Maroko, and Wysocki stating that it had granted an extension of time until November 30, so long as Arbah remained current on its contributions on a month-to-month basis. (Tr. 431–432; GC Exh. 29.)

On August 23, the parties met for contract negotiations at the Union's office in New York City, and discussed the healthcare issue as well. (Tr. 432.) As discussed above, Bokerman, Maroko, Stern, Padilla, and Rodriguez attended for the Union, and Lorenc, Wysocki and Ruiz attended for Arbah. (Tr. 433–434.) During this session, the Union requested a summary plan description or benefits at a glance for an overview of the coverage the proposed replacement plan would provide. (Tr. 434.) The Union further requested the total cost per employee per month, documents regarding dental and vision care, and any notices to employees that had been provided regarding the proposed plan. (Tr. 434.) Arbah took the position at the meeting that the coverage was comparable but could not answer specific questions. (Tr. 434–435.) The parties arranged another bargaining session for August 30, and Arbah agreed to bring representatives from its insurance broker to explain the details of the proposed health plan. (Tr. 435.)

During the next couple of days the parties exchanged e-mails regarding the variance and the implementation of the alternative health plan. On August 24, Lorenc e-mailed Bokerman, again rejecting the Fund's extension of the variance. (Tr. 446–447; GC Exh. 32.) Lorenc stated that Arbah did not unilaterally implement the proposed replacement plan due to the Fund 's statements in its June 21 letter regarding termination of coverage. (GC Exh. 32.) Lorenc stated that Arbah would make its contribution to the Fund for August, but could not meet to discuss the details of the replacement plan until before August 30. (GC Exh. 32.) On August 25, Michele Reynolds of the Fund wrote to Lorenc, with a copy to Bokerman, Maroko, and Ruiz. (Tr. 448–452; GC Exh. 33.) Reynolds stated that the Fund's June 21 letter constituted a notice that Arbah's participation might be terminated if it failed to make required contributions; because Arbah continued to make contributions its participation was not in fact terminated. (GC Exh. 33.) Reynolds also stated that the Fund's regular practice was to request and grant variance extensions from the Trustees even if one party participating in collective bargaining negotiations objected. (GC Exh. 33.) Finally, Reynolds stated that the extension was contingent upon Arbah's remitting required Fund contributions on a monthly basis. (GC Exh. 33.) Thus, Reynolds asked Lorenc to confirm immediately any intention by Arbah to forego remitting the September contribution, otherwise due October 15. (GC Exh. 33.) Reynolds stated that the Fund would treat such a confirmation as Arbah's withdrawal from participation. (GC Exh. 33.)

Subsequently in late August, Bokerman called Lorenc and asked that Arbah refrain from implementing the proposed Qual Care health care plan for one month to attempt to negotiate a new contract. (Tr. 453–454.) Lorenc called Bokerman later and said that Arbah would not agree to do so, and that Arbah wanted to implement the new health insurance as of September 1. (Tr. 455–456.) On August 29, the Union filed an unfair labor practice charge alleging that Arbah unlawfully threatened to unilaterally implement the new health plan. (Tr. 454; GC Exh. 1(g).)

The parties next met at the Union's office on August 30. Bokerman, Maroko, Stern, and Rodriguez attended for the Union, and Lorenc, Wysocki and Ruiz attended for Arbah, as well as two representatives from the the proposed new Qual Care health plan. (Tr. 146, 456.) At this point, Arbah had provided a side-by-side comparison of the Fund and Qual Care plans.[14] (Tr. 456, 598, 503–506; R.S. Exh. 3.) The insurance representatives also presented information regarding the health coverage and copays, and responded to the Union's questions. (Tr. 456, 598, 602.) The Union continued to ask for information that had not yet been provided, including a summary plan description, the provider network, and the total cost for the Qual Care plan per employee per month.[15] (Tr. 146–147, 456.) Bokerman testified that the brokers stated that they could not provide a summary plan description until the Qual Care plan was adopted. (Tr. 503.) During this session, the parties also discussed other contract terms. (Tr. 457.) Although Lorenc and Maroko discussed wage increases in a sidebar, Arbah did not propose providing the bargaining unit employees with wage increases from the savings which would result from changing health plans, and the parties did not discuss that issue. (Tr. 458.) As the session ended, the Union stated that a number of issues remained open for additional negotiations. The Union still had questions regarding the health insurance plan, and stated that it needed additional documents in order for negotiations to continue. (Tr. 146–147, 457–458, 609.) Specifically, the Union requested a breakdown of the total cost per employee per month, the provider network, and information regarding the dental and vision plans in order to evaluate the proposed Qual Care coverage and compare it to the plan offered through the Fund. (Tr. 525–526.) No additional bargaining session was scheduled at that point. (Tr. 459.)

On or around September 8, Arbah distributed a letter to the bargaining unit employees regarding the collective bargaining negotiations and health insurance coverage. (Tr. 650; GC Exh. 14.) Suarez testified that housekeeping supervisor Paola gave her and other Union members a Spanish-language version of the letter while they were working, and told them they had to sign to

[13] Arbah had been in favor of an earlier 90-day variance obtained from the Fund in February. Tr. 435–439; G.C. Ex. 30.

[14] Sometime in August, Arbah had arranged for the insurance brokers to conduct a "seminar" at the hotel for the bargaining unit employees to describe the Qual Care health plan coverage and copays. Tr. 598–599, 632, 669. During this seminar, the employees were presented with a prefilled application for Qual Care coverage ready to be signed, but they declined to do so. Tr. 669, 692–693.

[15] Ruiz testified that the insurance brokers provided the savings information requested by the Union but as a percentage. Tr. 603. Ruiz could not recall the insurance brokers providing an estimate of the per-employee cost or savings as a dollar amount. Tr. 603.

acknowledge receipt. (Tr. 175–176.) Suarez asked Paola for an English-language version of the letter. (Tr. 176; GC Exh. 14.) Suarez then called Stern and told her that Arbah was distributing a letter to the employees. (Tr. 78, 177.) Suarez also took a photo of the English-language version of the letter, and sent it to Stern. (Tr. 78–79, 177; GC Exh. 14.) Housekeeper Meleda Coronado similarly received a copy of the September 8 letter from Rubio and Wysocki while she was working in one of the guest rooms. (Tr. 376–377; GC Exh. 14.) Wysocki and Rubio told Coronado that the letter involved medical insurance and the Union. (Tr. 377.) They also told Coronado to go downstairs and sign to obtain medical coverage and get out of the Union. (Tr. 381–382, 390–392.)

The complete text of the September 8 letter distributed by Arbah to the bargaining unit employees, in evidence as General Counsel Exhibit 14, reads as follows:

> Dear Employees,
>
> As you all know, two years have already passed and we have been unsuccessful in signing a new contract with the Union. I have decided to reach out to you individually to explain to you the situation, since the signing of the Agreement deeply affects your job stability and security as well as the future of the hotel 's operation.
>
> Within the last three years, four new hotels have been built in our immediate neighborhood, with one build straight behind our parking lot. There is another one opening soon, not more than one mile south on Route 1 and 9. This puts new challenges on all of us because we now must compete with newly open facilities that provide a few of hundred extra hotel rooms in our vicinity. We are trying to keep our hotel in top line as we are constantly renovating and bringing our services up to new standards that are dictated by this new reality.
>
> From the start of our negotiations with the Union, they have been trying to implement a completely new contract, known as the GRIWA (Greater Regional Industry Wide Agreement). This contract is acceptable for the larger and prosperous hotels in Manhattan and New Jersey, but for a hotel like ours that operates in an economically deprived area with such strong competition. Signing into that general GRIWA contract would be for us betting for bankruptcy. The Union officials do not care for it. The only thing they are concerned about is their high salaries and bonuses as well as an easier way to negotiate one general contract that applies to all hotels.
>
> The Union is trying to put unreasonable pressure on management by filing unfounded charges against us with the National Labor Relations Board almost every day without dealing directly with us first. This amount of labor and time spent answering charges burdens our staff and prevents them from working on marketing and general operations of the hotel. This causes deprives you from sufficient working hours and causes us to lose business.
>
> Once again, we are currently presenting the Union with a new Health Insurance policy for you, as our employees, and your families. Our proposed insurance is exactly the same and with some benefit coverage better than the insurance Union is offering and willing to provide now. This health insurance will also bring us some financial savings that Union is unable or unwilling to match. According to the contract, we have a right to provide you with the same if not better health insurance. The Union officials, to their own benefit, are preventing you from having continued health insurance coverage. Your new health insurance policy is readily available, to be signed and enrolled into, without unnecessary lapses or loss in coverage.
>
> Please be advised that if you decided not to take our offer of health insurance, you would have to request that the Union provide you with health insurance coverage to be the same or better and less expensive than the benefits we are providing. If the Union is not willing to provide a Health Insurance policy that is the same or better and less expensive than our offered health benefits policy, you will be jeopardizing yourself and your families and be subject to losing coverage, as per the termination of the current plan.
>
> To the Union, we are proposing to renegotiate our expired contract while offering to give all of you a salary increase of 75 cents per hour in the first year and 50 cents increase per hour for the second year of the new contract so that we may share with you our savings from the newly offered Health Insurance Plan.
>
> The minor changes to our "old contract'' would not affect anything concerning your work environment or condition. The Union rejected our proposals only to protect their massive financial gains from their inefficient Health Insurance offered to you and to preserve their own interest while not caring for your job security and the health of you and your families.
>
> During the last meeting, when the insurance brokers informed you about the new health insurance plan, someone from the union employees group that was present threatened to go on strike. Please be advised that if you decide to go on strike we would have no other choice but to call on a lockout and hire new employees to replace all of the workers who would decide to go on strike. We cannot allow a few troublemakers to destroy the jobs of other hard-working employees in our hotel who would not be willing or choose to strike. Please also be advised that all of you who willingly decide to reject and choose to waive coverage of our Health Insurance Plan will not receive the coverage.
>
> Included with this letter please find the forms to either enroll into or waive the new Health Insurance Plan. Please return all signed documents no later than today and return to your department supervisor/manager who will then provide them to the Executive Office. If you choose to reject the coverage you MUST return the signed waiver. If you decide not to bring it back we will consider it as the rejection.
>
> Thank you for cooperation and please be reminded that unions come and go, but we will continue to work together and in many instances for more than 25 years as

> we have provided you with many opportunities to support yourselves and your families and offer the best available health insurance.
>
> Regards,
>
> Steve Silverberg President
> Arbah Hotel Corp.
>
> Mark Wysocki Vice President
> Arbah Hotel Corp.

Respondent had not discussed the September 8 letter with the Union prior to distributing it to the employees. (Tr. 80, 460–461.) Furthermore, Bokerman testified that the Union had not been informed of Arbah's proposal to provide the wage increases the letter describes, or that Arbah intended to share the savings from the new health plan with the employees in this manner. (Tr. 462–463.) In fact, on September 8, Bokerman e-mailed Lorenc regarding the letter distributed to employees and the Union's outstanding request for information regarding the Qual Care plan. (Tr. 463–464; GC Exh. 34.) Lorenc responded that Arbah's latest offer on wage increases involved a 75-cent increase per year for the 3-year term of the contract, which had apparently been conveyed to Maroko on September 5. (GC Exh. 34.)

On October 20, the Fund sent another notice to Arbah and the Union stating that Arbah was delinquent in its health fund contribution for September. (Tr. 465–467; GC Exh. 35.) As with previous delinquency notices, the October 20 letter stated, **"in order to avoid termination and a gap in your employees' coverage, you must submit your September 2017 report and payment immediately."** (GC Exh. 35) (emphasis in original). On November 1 and 2, Bokerman emailed Scot Mathson of the Fund and asked about the current status of health insurance coverage for the bargaining unit employees. (Tr. 467–470.) On November 2, Mathson responded that because the Fund did not receive a report or payment from Arbah for September, the bargaining unit employees had lost coverage for November. (Tr. 85–86; GC Exh. 36.) At that time, the bargaining unit employees had not been placed in a new health insurance plan. Tr. 468. It was not until June 14, 2018, that the Union was informed by new counsel for Arbah that the bargaining unit employees at Arbah had been enrolled in a new health insurance plan as of June 1, 2018. (Tr. 469.) At the time of the hearing, Arbah had not provided any information regarding the new health insurance plan to the Union. (Tr. 469.)

## III. DECISION AND ANALYSIS

### *A. Credibility Resolutions*

Evaluating a number of the pertinent fact issues in this case necessarily involves an assessment of witness credibility. Credibility determinations require consideration of the witness' testimony in context, including factors such as witness demeanor, "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), enfd. 56 Fed.Appx. 516, D.C.Cir. 2003; see also *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014). Corroboration and the relative reliability of conflicting testimony are also significant. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). It is not uncommon in making credibility determinations to find that some but not all of a particular witness' testimony is reliable. See, e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014).

In addition, the Board has developed general evidentiary principles for evaluating witness testimony and case presentation. For example, the Board has determined that the testimony of a Respondent's current employees may be considered particularly reliable, in that it is potentially adverse to their own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB 246, 253 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), affd. 83 F.3d 419 (5th Cir. 1996). It is also well-settled that an administrative law judge may draw an adverse inference from a party's failure to call a witness who would reasonably be assumed to corroborate that party's version of events, particularly where the witness is the party's agent. *Chipotle Services, LLC*, 363 NLRB No. 37, p. 1, fn. 1, p. 13 (2015), enfd. 849 F.3d 1161 (8th Cir. 2017); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Adverse inferences may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service, Inc.*, 360 NLRB 1029, 1030, and at fn. 13 (2014).

In making credibility resolutions here, I have considered the witnesses' demeanor, the context of their testimony, corroboration via other testimony or documentary evidence or lack thereof, the internal consistency of their accounts, and the witnesses' apparent interests, if any. Any credibility resolutions I have made are discussed and incorporated into the analysis which follows.

### *B. The Discharge of Marie Dufort on April 7, 2017 (Consolidated Complaint ¶¶ 16-17)*

The Consolidated Complaint alleges that Arbah violated Sections 8(a)(3) and (1) of the Act by discharging Marie Dufort on April 7 in retaliation for her support for and activities on behalf of the Union.

The Board evaluates allegations of unlawful discharge involving employer motivation using the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Pursuant to *Wright Line*, General Counsel must establish that an employee's union or protected activity was a motivating factor in the discharge. *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 6 (2016), enfd. 871 F.3d 358 (5th Cir. 2017). In order to do so, General Counsel must adduce evidence to demonstrate that the employee in question engaged in union or protected concerted activity, the employer's knowledge of that activity, and antiunion animus on the employer's part. *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 6; *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If General Counsel substantiates these elements of a *prima facie* case, the burden then shifts to the employer to show that it would have taken the same action in the absence of the employee's protected conduct. *Adams & Associates, Inc.*, 363

NLRB No. 193 at p. 6, citing *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997). In order to do so, the employer cannot simply present a legitimate reason for the adverse action but must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's protected activity. *North West Rural Electric Cooperative*, 366 NLRB No. 132 at p. 18 (2018); *Durham School Services*, 360 NLRB 694, 701 (2014).

The evidence here establishes that Dufort engaged in union activity prior to her April 7 discharge and the March 15 incident that allegedly precipitated her termination.[16] I found Sarah Stern and Carmen Suarez to be forthright and credible witnesses, both of whom testified to the best of their knowledge and recollection.[17] The evidence establishes that Dufort complained to them after supervisor Paola called her on February 8 to work an extra shift the next day, only to send her home on February 9 because the shift was no longer available. It is undisputed that Wysocki subsequently met with Dufort and Suarez and offered Dufort 4-hours pay in order to resolve the issue. The evidence further establishes that despite this meeting, Dufort sought the Union's intervention to obtain the resolution to which she felt she was entitled. Stern then sent Ruiz an e-mail on February 13 requesting information regarding both the February 9 call-in incident and an incident in December 2016 regarding a supervisor's response after Dufort reported that she had discovered a large quantity of marijuana in one of the rooms she was assigned to clean. Later in February the parties, including Dufort, met again regarding these issues, this time with Stern and union representative Nicholas present. Dufort's complaints to Stern and participation in the ensuing grievance meetings constituted protected union activity. See *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 836 (1984); *Brad Snodgrass, Inc.,* 338 NLRB 917, 923 (2003); *John Conlee Enterprises,* 317 NLRB 1082, 1085–1086 (1995), enfd. 124 F.3d 198 (6th Cir. 1997). Wysocki, Ruiz, and housekeeping supervisors Paola and Raisa participated in the meetings and received Stern's February 13 e-mail, thus establishing employer knowledge.

The record further establishes Arbah's animus against the Union as a general matter and with respect to Dufort's specific union activity. I credit Dufort's testimony that housekeeping supervisor Jessica, admittedly a supervisor pursuant to Section 2(11) of the Act, informed Dufort on the second day of the comforter incident that Wysocki, "asked me to follow you wherever [you] go because [you] complained to the Union." Because Jessica did not testify at the hearing, Dufort's description of their discussion is unrebutted.[18] See, e.g., *Mexican Radio Corp.*, 366 NLRB No. 65 at p. 19 (2018). Thus, I further credit Dufort's testimony that Jessica told her during this conversation that Wysocki wanted to "get rid of" Dufort because she "complained to the Union." Indeed, Jessica's remarks are consistent with Wysocki's own statement to Dufort that he did not want the Union involved because "when the Union comes, things get ugly," and his statement to Suarez that he intended to fire Dufort because she had refused to sign the March 17 Discipline Notices and had called the Union.[19] Similarly, Stern testified that at the May 9 grievance meeting regarding Dufort's discharge, Wysocki continued to complain that Dufort's "raising all of these issues had cost the employer a lot of time and money and personnel time," which was "a big deal."[20] Wysocki also claimed at that meeting that he might not settle Dufort's grievance because the Union "had put him up against the wall" by filing the instant unfair labor practice charge regarding Dufort's discharge. Finally, I have found that Arbah violated the Act in several other respects, as discussed below, additional violations which also evince anti-union animus. See *Metro-West Ambulance Service,* 360 NLRB at 1029, and at fn. 2; *Lucky Cab Co.,* 360 NLRB 271, 274 (2014) (employer's contemporaneous violations demonstrate antiunion animus). Thus, the record establishes anti-union animus with respect to Arbah, and with respect to Wysocki in particular, that specifically involved Dufort's activities.

The timing of Dufort's discharge also strongly indicates that the discharge was unlawfully motivated. The evidence establishes that on March 16, Suarez and Wysocki discussed the stained bedding issue while Suarez was working in a guest room with supervisor Raisa. Suarez testified that during this conversation, Wysocki initially informed her that he intended to discharge Dufort for "violat[ing] an article of honesty," and Suarez protested that he should not do so given Dufort's diligence.

[16] General Counsel does not contend that Dufort's "cover up and lying" regarding the stained comfoter constituted protected concerted activity, as Arbah claims. R.S. Post-Hearing Brief at p. 12, 15.

[17] Suarez is a 24-year employee of the hotel who has been a shop steward or delegate for approximately 15 years, and her substantial knowledge regarding the housekeepers' work was apparent. Tr. 183–184. Although still employed by Arbah at the time of her testimony, she was also a union representative, and as such I have not ascribed a presumption of heightened reliability to her testimony. Stern testified in a straightforward manner and was eager to clarify previous testimony when provided with the opportunity; it was apparent from her demeanor that she was committed to accurately depicting the pertinent events. Tr. 52, 87–88.

[18] I decline to draw an adverse inference from Arbah's failure to call Jessica, Paola, Raisa Perez, or Rosa DiCenso as witnesses, as suggested by General Counsel. G.C. Post-Hearing Brief at p. 29, fn. 7. The evidence establishes that Rosa DiCenso and Raisa Perez were no longer employed by Arbah at the time of the hearing in this matter, and there was no evidence presented regarding Paola and Jessica's employment status. Tr. 534. The record therefore does not establish that these individuals would have been inclined to testify favorably to Arbah if called. See, e.g., *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53 at p. 1, fn. 1 (2018).

[19] I credit Dufort and Suarez's accounts of these conversations with Wysocki, as Wysocki was not questioned about them and contradicted neither during his testimony. Dufort's testimony was occasionally emotional and impassioned, and she evinced some confusion regarding the specific dates of incidents preceding her discharge. See Tr. 301–303. However, because Wysocki did not address these issues during his testimony, Dufort's description of their discussion is unrebutted. See *Coserv Electric*, 366 NLRB No. 103 at p. 3, fn. 7, and at p. 8 (2018) (crediting unrebutted witness testimony despite demeanor issues and conflicts between testimony and witness' own affidavit). For that reason and based upon Dufort's demeanor and the consistency of her testimony with that of other witnesses as discussed herein, I find her to be a credible witness overall.

[20] Although Wysocki, Rubio, and Ruiz testified at the hearing, they were not questioned regarding the May 9 meeting with the Union, so that Stern's testimony is unrebutted in this respect.

Wysocki left the room, returned a few moments later and told Suarez that he had decided to give Dufort a written warning and suspend her instead of terminating her employment. Later that day, Dufort and Suarez were presented with the two Discipline Notices, which they refused to sign, and on March 16 or 17 Dufort reported the matter to Stern. Then, during the next couple of days, Wysocki informed Suarez, with Raisa translating, that he intended to fire Dufort because she had refused to sign the Discipline Notices and had called the Union. Wysocki did not address these conversations during his testimony and Raisa did not testify at the hearing, so that Suarez's account is completely unrebutted. The evidence therefore establishes that Dufort's refusal to sign the Discipline Notices and contact with the Union were the sole relevant intervening events between Wysocki's statement to Suarez that Dufort would not be discharged, and his assertion days later that he intended to discharge her for those very reasons. Such a scenario is redolent of unlawful motivation. See, e.g., *New Haven Register*, 346 NLRB 1131, 1145 (2006) (2-week delay in imposing suspension indicative of unlawful motive where protected conduct was "the only intervening event"); *Mid-Mountain Foods*, 332 NLRB 251, 252–253 (2000), enfd. 11 Fed.Appx. 372 (4th Cir. 2001).

Arbah argues that this sequence of events does not tend to establish unlawful motive because one of the Discipline Notices states that it "could change into a dismissal notice based on further investigation of your insubordination and dishonesty." (R.S. Posthearing Br. at p. 18; GC Exh. 19.) However, Arbah offers nothing to explain Wysocki's *reasons* for altering Dufort's discipline from the suspension and written warning he had previously discussed with Suarez to a discharge. This is particularly significant given that during his initial conversation with Suarez, Wysocki had apparently determined that, as he told Suarez, Dufort had "violated an article of honesty," which entitled Arbah to "summarily discharge" an employee pursuant to Article XI of the collective bargaining agreement. As a result, the evidence does not establish that Wysocki was somehow mistaken or confused when he initially spoke to Suarez about the nature of Dufort's alleged misconduct or its potential consequences. Arbah offers no explanation for Wysocki's conversion of the discipline issued to Dufort to a discharge to counter the substantial evidence establishing that the sole intervening events involved Dufort's refusal to sign the Discipline Notices and contact with the Union. And that evidence is further consistent with Wysocki's later comments to Suarez describing his motivation.

As discussed above, the evidence establishes that Dufort engaged in union activity and that Arbah had knowledge of that activity as well as antiunion animus. The evidence also establishes a sequence of events indicative of extremely suspect timing. As a result, the burden shifts to Arbah to demonstrate by a preponderance of the evidence that it would have discharged Dufort even in the absence of her union activities.

Arbah contends that Dufort was legitimately discharged for "insubordination," and "dishonesty." (GC Exh. 20.) The record evidence overall does not substantiate this contention, which I therefore find to be pretextual. The evidence does not support the contention in Arbah's Dismissal Notice that Dufort was "insubordinate" and "dishonest" because she refused to replace a stained comforter and/or entered room 426 on more than one occasion without permission or approval from her immediate supervisors. Dufort testified that when Jessica directed her to replace the stained comforter on March 15, she did so. Dufort further testified that when Jessica directed her the next day to replace the comforter in the same guest room again, she replaced that comforter a second time. Again, because Jessica did not testify, Dufort's account of their interactions in this regard, and of her own activities on March 15 and 16, is unrebutted. Furthermore, Suarez testified that she and Dufort visited the guest room in question together on the morning of March 16, and corroborated Dufort's testimony that the comforter on the bed was not in fact stained. (Tr. 161–162, 196.) Suarez testified that when she informed housekeeping supervisors Raisa and Paola that the comforter was not stained, they disputed this contention. (Tr. 162.) However, neither Raisa nor Paola testified at the hearing. In addition, none of the photographs or video of the stained comforter purportedly taken by the housekeeping supervisors, and mentioned in both Discipline Notices issued to Dufort, were produced at the hearing. (Tr. 162; GC Exh. 19.) As a result, there is simply no evidence to contradict Dufort and Suarez's account of the incident, or to substantiate Respondent's. This sort of a failure to substantiate critical aspects of the circumstances purportedly justifying a discharge constitutes evidence of pretext. *Lucky Cab Co.*, 360 NLRB at 274–275 (2014); see also *Windsor Convalescent Center*, 351 NLRB 975, 983–984 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009).

Furthermore, the evidence establishes that "flipping" a stained comforter—arranging the comforter so that the stain was at the foot of the bed and face down—was common practice among the housekeeping staff, and had never previously been grounds for a write-up, let alone a discharge. The failure to discipline or discharge other employees for the identical or similar infractions establishes that the employer's proferred justifications for doing so are in fact pretextual. See, e.g., *Lucky Cab Co.*, 360 NLRB at 274, citing *Windsor Convalescent Center*, 351 NLRB at 983 (evidence that other employees were not discharged for the same or similar infractions establishes pretext). Suarez and Dufort, who had been housekeepers for 24 and 21 years, respectively, both testified that the common practice was to flip over stained comforters in this manner, because there was insufficient bedding to adequately make up all of the guest rooms. (Tr. 51, 158, 163, 196–197, 279–280, 306–307.) This testimony was corroborated by the testimony of two witnesses, Yvette Charles and Meleda Coronado, employed by Arbah as housekeepers for more than 20 years. (Tr. 354, 371.) Both Charles and Coronado testified that the housekeepers' common practice was to flip stained comforters to the other side, instead of changing them. (Tr. 355–358, 374–375). Charles and Coronado both stated, as did Suarez and Dufort, that flipping the stained comforters was necessary because there was inadequate bed linen for all of the guest rooms in the hotel. (Tr. 163, 306, 356–357, 374.) Charles, Coronado, Suarez, and Dufort all testified that they had been instructed to flip the stained comforters over instead of replacing them by housekeeping manager Rosa DiCenso. (Tr. 163, 306–307, 356–357, 374–375.) Indeed, Charles testified that she and DiCenso once flipped over a stained comforter while cleaning a guest room with Dufort present. (Tr. 356–357.)

As currently employees who do not hold union office, Charles

and Coronado have no interest in the proceeding, and their testimony is considered particularly reliable. *Covanta Bristol, Inc.*, 356 NLRB at 253. In addition, DiCenso did not testify, so Dufort, Suarez, Charles and Coronado's specific testimony that DiCenso directed them to flip over stained comforters, and in fact assisted them in doing so, is not only consistent but unrebutted. I also note that Dufort, Suarez, Charles and Coronado had each been employed as housekeepers at Arbah for over 20 years. The only evidence offered by Arbah to counter General Counsel's witnesses in this regard was the testimony of Vanessa Rubio, who stated that stained comforters were replaced, as opposed to flipped over. (Tr. 534.) However, Rubio testified that she received training as a supervisor manager in housekeeping "years ago," and that she resumed working as a housekeeping supervisor in the summer of 2017, months after Dufort had been discharged.[21] (Tr. 530, 533–534.) As a result, Rubio's testimony regarding the housekeepers' practice with respect to stained comforters does not effectively rebut Dufort, Suarez, Charles, and Coronado's testimony that the housekeepers, as directed by manager Rosa DiCenso, routinely flipped stained comforters over, as opposed to replacing them.[22]

The evidence further establishes that Arbah had never before disciplined a housekeeper for flipping over, as opposed to replacing, a stained comforter. Dufort, Suarez, Charles, and Coronado all testified that prior to Dufort's discharge none of the housekeepers had been disciplined in any way for flipping a stained comforter. (Tr. 175, 307, 357–358, 375.) I credit their consistent testimony in this regard given the heightened reliability ascribed to Charles and Coronado's testimony and their lengthy employment as housekeepers. In addition, I credit Stern's testimony that Arbah stated in response to the Union's request for other discipline issued regarding stained bedding that it could not find any similar disciplinary incidents. (Tr. 87–88.) No such discipline was produced or entered into evidence at the hearing. Arbah presented testimony from Rubio regarding a laundry worker who was discharged when a blouse that a guest had reported missing was discovered in the laundry worker's locker. (Tr. 448–449.) However, Rubio testified that the laundry worker was discharged not only for "dishonesty" but also for "theft." (Tr. 449.) Furthermore, Rubio was not confident in her recall of the incident, stating, "I believe, maybe I'm wrong, it was such a long time ago" when describing what had occurred. (Tr. 449.) Thus, the record evidence does not establish any consistent practice of disciplining, let along discharging, housekeeping employees for for some sort of "dishonesty" short of theft, or for flipping over instead of replacing stained comforters. Indeed, the record does not establish any prior discipline whatsoever for flipping a stained comforter or "dishonesty" on the part of a housekeeping employee prior to Dufort's discharge for these alleged infractions. This indicates that Arbah's asserted rationale for Dufort's discharge was in fact pretextual. See, e.g., *Lucky Cab Co.*, 360 NLRB at 274.

In light of the foregoing, Arbah's contention that Dufort, Suarez, and Stern made inconsistent statements regarding whether Dufort flipped the comforter or changed it as directed by Jessica does not substantiate Arbah's asserted rationale for the discharge. (R.S. Posthearing Br. at 12–13.) As Arbah discusses in its brief, Dufort testified that she always changed as opposed to flipped over comforters and did so when directed by Jessica on March 15. (Tr. 304–307.) As discussed previously, the *only* evidence presented regarding whether Dufort changed or flipped the comforter at that time was Dufort's testimony. In addition, Suarez did not state in her testimony regarding the events of March 16 that Dufort told her that she had flipped over the comforter, as opposed to changing it. Instead, Suarez testified that Dufort "didn't have to tell me" that she had flipped over the comforter, because for Suarez, "that was the standard practice." Tr. 196–197, 203. Suarez's testimony therefore does not establish that Dufort informed her that she had flipped over the comforter; Suarez apparently made that assumption herself based upon the long-standing practice of the housekeeping staff. Stern's argument in connection with the grievance regarding Dufort's discharge that flipping over a stained comforter was an accepted practice addresses the proffered reasons for Dufort's discharge and does not contradict Dufort's assertion that she changed the comforter when directed by Jessica on March 15.

For all of the foregoing reasons, the preponderance of the evidence does not establish that Arbah would have discharged Marie Dufort on April 7 in the absence of her union support and activities. As a result, given the evidence establishing Dufort's union activity, Arbah's knowledge of and animus toward that activity, and the suspect timing involved, Dufort's discharge violated Sections 8(a)(3) and (1) of the Act.

### *C. The Denial of Access to George Padilla on August 24 (Consolidated Complaint ¶¶ 23–24)*

The Consolidated Complaint alleges that Arbah violated Sections 8(a)(5) and (1) of the Act when it unilaterally denied access to Union business agent George Padilla by letter dated August 24. The evidence establishes that the collective bargaining agreement between Arbah and the Union contains a clause permitting union representatives to visit the hotel's premises. As discussed above, Stern and Wysocki both testified at the hearing that the parties were continuing to apply the terms of the expired contract. In any event, it is well-settled that union access provisions survive a contract's expiration. See, e.g., *Southern Bakeries, LLC*, 364 NLRB No. 64 at p. 1, 32 (2016), enf. granted and denied in part on other grounds 871 F.3d 811 (8th Cir. 2017); *Great Western Coca-Cola Bottling Co.*, 265 NLRB 766, 778 (1982), enfd. 740 F.2d 398 (5th Cir. 1984). In addition, union visitation is a mandatory subject of bargaining which may not be unilaterally changed. See, e.g., *Noel Canning*, 364 NLRB No. 45 at p. 4 (2016); *Turtle Bay Resorts*, 355 NLRB 1272 (2010).

The evidence establishes that on August 24, Wysocki, through Ruiz, informed the Union in an e-mail that Arbah would not

[21] Suarez testified that she and other housekeepers began replacing stained comforters, as opposed to flipping them over, only after Dufort had been discharged. Tr. 201–202.

[22] Similarly, Suarez testified that housekeepers sometimes completed work in a room they had been assigned on the previous day, even without a supervisor's permission, if, for example, the necessary linens were not available. Tr. 198–199. No evidence was presented by Arbah in order to rebut Suarez's testimony, or to establish that housekeepers had previously been disciplined for entering a room to complete their work on the following day without a supervisor's permission.

recognize George Padilla as a union representative, and that Arbah would call law enforcement to have Padilla removed from its premises if he attempted to visit. The evidence demonstrates that Arbah did not request bargaining or otherwise attempt to address any issues involving Padilla with the Union before sending its August 24 letter, even though Arbah and the Union had met for contract negotiations—with Padilla present—the previous day. The evidence therefore establishes that Arbah denied Padilla access to its premises without bargaining with the Union.

Arbah argues that it was permitted to deny Padilla access to its premises by virtue of Padilla's previous conduct. It is well-settled that "each party to a collective bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 379 (1980), enfd. 670 F.2d 663 (1982), quoted in *Neilmed Products*, 358 NLRB 47, 51–52 (2012); see also *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21 at p. 11 (2015), quoting *United Parcel Service*, 330 NLRB 1020 fn. 1 (2000) (parties must deal with one another's chosen representatives "absent extraordinary circumstances"). However, an employer may be relieved of its duty to deal with a particular Union representative whose presence would make bargaining "impossible or futile." *Id.* In order to make such a showing, the party must introduce "*persuasive evidence* that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *Fitzsimmons Mfg. Co.*, 251 NLRB at 379 (emphasis in original), quoting *KDEN Broadcasting*, 225 NLRB 25 (1976); *North Memorial Health Care*, 364 NLRB No. 61 at 28 (2016), enfd. in relevant part 860 F.3d 639 (8th Cir. 2017). The employer asserting such a defense bears the burden of persuasion with respect to the issue. *J&J Snack Foods Handhelds Corp.*, 363 NLRB No. 21 at p. 11. But even in the event that there are "instances of abuse that warrant[] changing the practice," the employer is still required to "bargain with the Union over possible solutions to any problems with access," given that access is a mandatory subject of bargaining. *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997), enf. granted and denied in part on other grounds 118 F.3d 795 (D.C. Cir. 1997) ("The Act requires that, instead of implementing its own solution to perceived abuse, the Respondent bargain with the Union over possible solutions to any problems with access").

The conduct Arbah relies upon in order to establish that Padilla's presence would create ill will and preclude good-faith bargaining does not rise to the level required by the Board in order to satisfy this standard. Cases where the Board has found persuasive evidence that the specific representative would make good-faith bargaining impossible involve, for example, threats of violence and death against a Respondent's supervisor, human resources director and president, and an "unprovoked physical attack" on the company's personnel director. *Fitzsimmons Mfg. Co.*, 251 NLRB at 379–380; see also *Pan American Grain Co.*, 343 NLRB 205 (2004) (representative threatened to "tear off" a supervisor's head and "exchange blows" with the human resources director and stated that the company's president "has to be killed"). By contrast, the Board has found a denial of access violation despite significant representative misconduct short of unprovoked or severe threats of violence. See, e.g., *Victoria Packaging Corp.*, 332 NLRB 597, 599–600 (2000) (representative yelled, "I'm going to get you and your . . . company" at owner after direction not to talk to employees on work time); *Long Island Jewish Hillside Medical Center*, 296 NLRB 51, 71–72 (1989) (representative cursed at and shoved manager).

Arbah's evidence with respect to Padilla's behavior, even to the extent it is substantiated, does not persuasively establish that Padilla's presence would create ill will and obviate the possibility of good-faith bargaining. For example, Arbah presented extensive testimony from Wysocki, Rubio and Ruiz regarding previous incidents where Padilla allegedly used Spanish-language profanity, engaged in a heated discussion with management and bargaining unit employees, and contacted management personnel on their cell phones after hours. (Tr. 541–543, 567–587, 671–673; GC Exh. 15; R.S. Exh. 4.) None of this conduct would justify prohibiting Padilla's access to the hotel pursuant to the cases discussed above. Moreover, all of these incidents took place in 2015 and 2016, pre-dating the January 27 settlement agreement specifically stating that Arbah "will not bar any Union representatives from the Hotel nor interfere with their access pursuant to the expired CBA." (GC Exh. 12.)

Arbah further claims that it was entitled to bar Padilla from the premises in August because the January 27 settlement agreement contained a "condition precedent" to Padilla's returning—a meeting between the parties which never in fact occurred. (R.S. Posthearing Br. at 28–30.) The portion of the January 27 settlement agreement addressing union access provides as follows:

> 3. The Employer will not bar any Union representatives from the Hotel nor interfere with their access pursuant to the expired CBA. Prior to Mr. Padilla returning to the Hotel, the parties shall meet, provided such meeting must take place before February 15, 2017.

(GC Exh. 12.) I find that this language does not make the meeting between the parties a condition precedent to Padilla's resuming visitation. While this paragraph provides for a meeting between the Union and Arbah prior to Padilla's returning to the premises, it requires that the meeting take place prior to February 15. This date therefore is a deadline, or a condition of the meeting's taking place. As a result, the settlement agreement does not make the meeting a condition precedent to Padilla's *ever* returning to the hotel's premises. Nor does this portion of the settlement agreement somehow place the onus on Padilla or the Union to arrange the meeting or forfeit Padilla's access to Arbah's premises, as Arbah contends. In fact, the paragraph specifically states that Arbah "will not bar *any* union representatives from the Hotel nor interfere with their access pursuant to the expired CBA" (emphasis added).

Arbah introduced evidence regarding only one visit made by Padilla to the hotel after the January 27 settlement agreement, sometime in August. The evidence regarding this visit establishes that Padilla and Wysocki were "arguing" in the second floor hallway outside of the meeting room, that Padilla was attempting to talk to Wysocki, and that after Wysocki said, "you're in violation to come in here . . . you shouldn't be here," Padilla

left.[23] (Tr. 544–546, 672.) Under Board law such an incident clearly does not constitute "persuasive evidence" that Padilla's presence would create ill will and make good-faith bargaining impossible. See, e.g., *Claremont Resort & Spa*, 344 NLRB 832, fn. 2, 635 (2005) (unlawfully barred representative had attempted to enter a meeting knowing that she was not invited, ignored directives not to enter the room, used profanity, and collided with a security guard); *Pan American Grain Co.*, 343 NLRB at 205. In addition, Wysocki and Rubio, who testified regarding this incident, could not recall whether it occurred before or after the August 24 letter was sent to the Union.[24] (Tr. 551–552, 677–678.) And it is undisputed that on August 23, Padilla attended and participated in a bargaining session without any ensuing disruption, and without Arbah's objecting to his presence. See *Caribe Staple Co.*, 313 NLRB 877, 889–890 (1994) (employer's justification for denying Union representative access belied by its failure to object to representative's presence at negotiations, and lack of representative's negative impact on bargaining).

Furthermore, when questioned at the hearing regarding his reasons for attempting to prohibit Padilla in particular from visiting the hotel, Wysocki did not refer to Padilla's allegedly threatening behavior toward Arbah's management personnel at all. Instead, Wysocki testified that he prohibited Padilla from visiting the hotel because Padilla was always, "trying to use the leverage from our employees, meet with them downstairs," and "using the employees as a kind of human shield, bringing them up and trying to agitate them." (Tr. 670–671.) Wysocki elaborated that "every time after" Padilla met with the bargaining unit employees, "there are always a couple of days for employees to kind of calm down and go about their business," so that it was "practically very uncomfortable for the employer to deal with the employees after he has a meeting with them." (Tr. 671.) Thus, Wysocki's fundamental objections to Padilla's conduct involved his interactions as a business agent with the bargaining unit employees. They did not concern the unprofessional behavior with the hotel's management staff that supposedly precipitated Wysocki's August 24 letter barring Padilla from the hotel premises. This inconsistency undermines Arbah's assertions regarding the basis for its denial of access to Padilla.

Finally, although Wysocki, Rubio, and Ruiz testified that Padilla violated the collective bargaining agreement by visiting the hotel without contacting management,[25] Arbah does not raise this contention in its posthearing brief. In any event, parole evidence is admissible in order to establish the existence of a past practice inconsistent with the terms of the expired contract. *Church Square Supermarket*, 356 NLRB 1357, 1359 (2011), citing *Sacramento Union*, 258 NLRB 1074, 1075 fn. 8 (1981) and *Smith's Industries v. NLRB*, 86 F.3d 76, 80 (6th Cir. 1996). The evidence here establishes that despite the language of the Union access provision, the Union's representatives routinely visited Arbah's premises without providing advance notice to management. For example, Stern credibly testified that she visited the hotel at least once a month, often without calling or e-mailing the management office in advance. Stern testified that during these visits she met and spoke with bargaining unit employees throughout the hotel, so long as their interactions did not interfere with the employees' work. Ruiz also testified that union representatives had visited the hotel without providing advance notice to management. As a result, the evidence establishes a past practice of union representatives' visiting the hotel without providing advance notice, despite the contract's language.

For all of the foregoing reasons, the evidence establishes that Arbah violated Sections 8(a)(5) and (1) of the Act by unilaterally denying George Padilla access to the hotel on August 24.

*D. The September 8 Letter (Consolidated Complaint ¶¶ 21, 22)*

The Consolidated Complaint alleges that the September 8 letter distributed by Arbah to the bargaining unit employees threatened the employees with the unilateral termination of their negotiated health insurance coverage if they did not sign up for the new Qual Care plan, in violation of Section 8(a)(1) of the Act. The Consolidated Complaint further alleges that the September 8 letter constituted direct dealing with the bargaining unit employees by unilaterally threatening to discontinue their negotiated health insurance coverage, in violation of Sections 8(a)(5) and (1).

The evidence establishes that Arbah's September 8 letter unlawfully threatened employees with the unilateral termination of their health insurance coverage if the employees did not sign up for the Qual Care plan. While an employer is entitled pursuant to Section 8(c) of the Act to communicate its views to employees in a non-coercive manner, such communications may not threaten reprisals or promise benefits. *Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969). It is well-settled that threats to terminate employee health insurance coverage or benefits violate Section 8(a)(1). See, e.g., *Smithfield Packing Co.*, 344 NLRB 1, 7 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006); *Rock Island Franciscan Hospital*, 226 NLRB 291, 294 (1976).

Here, Arbah's September 8 letter went beyond the communication of its views regarding the status of bargaining and its proposals pertaining to wages and health insurance. Instead the letter explicitly asserted that the employees and any covered dependents would likely lose health insurance entirely if they did not sign up for the new Qual Care plan Arbah wished to implement. After contending that, "The Union officials, to their own benefit, are preventing you from having continued health insurance coverage," the letter states as follows:

> Please be advised that if you decided not to take our offer of health insurance, you would have to request that the Union provide you with health insurance coverage to be the same or better and less expensive than the benefits we are providing. If the Union is not willing to provide a Health

[23] Rubio provided the most detailed and comprehensive account of this incident, and I therefore credit her testimony in this regard.

[24] Wysocki's contention in the August 24 letter that Ward had "ignored" his August 2, 2016 letter was clearly incorrect, since the issue Wysocki raised in the August 2, 2016 letter was addressed in the January 27 settlement agreement between the parties. GC Exhs. 12, 13, 15.

[25] Article XX of the contract states that union representatives may visit the hotel "upon giving notice in advance to management." GC Exh. 3.

> Insurance policy that is the same or better and less expensive than our offered health benefits policy, you will be jeopardizing yourself and your families and be subject to losing coverage, as per the termination of the current plan.

(GC Exh. 14.) The letter thus informs the employees that if they declined to participate in the Qual Care plan, they would have to seek health insurance coverage from the Union, because the UNITE HERE Health Fund coverage provided pursuant to the collective bargaining agreement would no longer be available. Wysocki formulated the issue in this manner again when cross-examining Suarez pro se on the first day of the hearing, asking Suarez, "So, you are willing to jeopardize your health and the health of your family and wait for the Union to provide you with insurance?" (Tr. 211.) Wysocki's statements clearly convey to the employees that if they did not sign up for the Qual Care plan Arbah was seeking to implement, they and their covered dependents would be left without health insurance entirely.

The evidence further establishes that Wysocki and Rubio directly linked signing up for the Qual Care plan with rejection of the Union when they distributed the September 8 letter to housekeeper Meleda Coronado. Coronado testified that Wysocki and Rubio gave her a copy of the letter while she was working, telling her that the letter involved medical insurance *and* the Union. Coronado testified that Wysocki and Rubio then directed her to go downstairs and sign up to obtain medical coverage and get out of the Union. As a current employee of Arbah, Coronado's testimony is subject to a presumption of heightened reliability. *Covanta Bristol, Inc.*, 356 NLRB at 253. Ruiz testified that she never asked employees personally to sign up for the Qual Care plan and that to the best of her knowledge no other management personnel did so. (Tr. 596.) However, Rubio was not questioned regarding this conversation with Coronado during her testimony. Nor did Wysocki address the issue, despite discussing the September 8 letter at length. (Tr. 654–665.) As a result, I credit Coronado's testimony regarding Wysocki and Rubio's statements to her at the time they gave her the letter, which explicitly linked continued health insurance coverage via the Qual Care plan with rejecting the Union.

For all of the foregoing reasons, the evidence establishes that the September 8, 2017 letter contained a threat to unilaterally terminate the bargaining unit employees' existing health coverage if the employees did not sign up for the new Qual Care plan, in violation of Section 8(a)(1) of the Act.

The evidence further establishes that Arbah dealt directly with the bargaining unit employees via the September 8 letter, as alleged in the Consolidated Complaint. In order to determine whether an employer has engaged in direct dealing in violation of Sections 8(a)(5) and (1) of the Act, the Board evaluates whether:

> (1) the Respondent was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union.

*Penford Products Co.*, 366 NLRB No. 74 at p. 9 (2018), quoting *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000). An employer is entitled pursuant to Section 8(c) of the Act to "communicate its position in collective bargaining negotiations and in the course of those negotiations." *Safelite Glass*, 283 NLRB 929, 930–931 (1987), quoting *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985), enf. granted and denied in part on other grounds, 890 F.2d 1573 (10th Cir. 1989); see also *American Meat Packing Corp.*, 301 NLRB 835, 839 (1991), enfd. 315 F.3d 951 (10th Cir. 2003). However, the employer may not attempt to bypass, disparage, or induce the employees to abandon the union. Id.

All of the criteria articulated in *Permanente Medical Group* are satisfied here. The evidence establishes that Arbah communicated directly with the bargaining unit employees when Wysocki and Rubio distributed the September 8 letter to them at the hotel. Furthermore, the Union was excluded from the communication, as there is no dispute that Arbah did not discuss or provide a copy of the September 8 letter to the Union prior to doing distributing it to the employees. See *RTP Co.*, 334 NLRB 466, 466–467 (2001) (employer's failure to consult with the union prior to issuing a letter to employees regarding bargaining and contract terms indicates that the employer was engaged in direct dealing).

In addition, the text of the letter was clearly intended to establish or change wages, hours and terms and conditions of employment and to undercut the Union's role in bargaining. The pertinent portion of the September 8 letter states as follows:

> To the Union, we are proposing to renegotiate our expired contract while offering to give all of you a salary increase of 75 cents per hour in the first year and 50 cents increase per hour for the second year of the new contract so that we may share with you our savings from the newly offered Health Insurance Plan.

(GC Exh. 14.)

The evidence establishes that this specific wage increase offer, and its underlying rationale, had not been proposed to the Union before the September 8 letter was distributed to the bargaining unit employees. The negotiating session preceding the distribution of the letter on August 30 had primarily addressed the proposed Qual Care health plan, with insurance brokers present to provide information and respond to the Union's questions. However, by the end of this meeting the Union was still requesting additional information regarding the Qual Care plan in order to continue negotiations, specifically the total cost per employee per month, the provider network,[26] and information regarding the

[26] The evidence does not establish that the provider network information was given to the Union at the August 30 meeting. Although Ruiz testified that one of the insurance brokers gave the Union a link to a website where the provider network was available during the meeting, she also testified that Stern stated that she was unable to access the link on her computer. Tr. 604–606. In addition, Bokerman testified that the link to the provider network was not given to the Union until January 2018. Tr. 509. Finally, in a September 8 e-mail to Bokerman, Lorenc stated that the "*impossibility* of compiling a provider list" for the Qual Care health plan was "explained at length on the 30th" (emphasis added). GC Exh. 34.

dental and vision plans. Furthermore, while there is some evidence that Lorenc and Maroko discussed wage increases during a sidebar, nothing in the record establishes that Arbah proposed using some of the savings from the change in health plans to provide wage increases to the bargaining unit employees, or made the specific wage proposal contained in the September 8 letter.[27]

Nor does the evidence establish that the wage increase proposal discussed in the September 8 letter was conveyed to the Union in any other context. Bokerman credibly testified that as of September 8, Arbah had not proposed that any savings obtained by changing health insurance plans be passed along to the bargaining unit employees in the form of wages increases. Bokerman's testimony that Arbah had not informed the Union regarding the specific wage increases described in the September 8 letter is similarly credible. Both assertions are consistent with an e-mail exchange between Bokerman and Lorenc that day. In those e-mails, Bokerman confronted Lorenc regarding the letter Arbah was distributing to the employees, and Lorenc stated in his response that Arbah's most recent offer regarding wage increases involved a 75-cent per hour increase per contract year. (GC Exh. 34.) Thus, the evidence demonstrates that the wage proposal described by Wysocki in the September 8 letter had not been communicated to the Union prior to Wysocki and Rubio's distributing the letter to the bargaining unit employees. Nor had the more general concept of "passing along" any savings obtained via changing health insurance plans to the bargaining unit employees in wage increases. Therefore, despite the language "To the Union," Arbah's wage proposal in the September 8 letter was made to engage the bargaining unit employees directly in its attempt to change health care plans, the primary (and unresolved) subject of the preceding bargaining session.

It is also significant that the September 8 letter's language describing the new wage proposal is bracketed by statements disparaging the Union. The paragraphs preceding Arbah's wage increase proposal inform the employees that, "The Union officials, to their own benefit, are preventing you from having continued health insurance coverage," and contain the unlawful threat to unilaterally terminate health insurance discussed above. The two sentences immediately following the wage increase proposal state as follows:

> The minor changes to our "old contract" would not affect anything concerning your work environment or condition. The Union rejected our proposals only to protect their massive financial gains from their inefficient Health Insurance offered to you to preserve their own interest while not caring for your job security and the health of you and your families.

(GC Exh. 14.) By stating that the Union's motivations in connection with the health insurance and wage issues being negotiated were in fact adverse to those of the bargaining unit employees, the September 8 letter attempted denigrate the Union to the employees and undermine the Union's role in bargaining.

For all of the foregoing reasons, the evidence establishes that Arbah's September 8 letter constituted an attempt to deal directly with the bargaining unit employees, in violation of Sections 8(a)(5) and (1) of the Act.

### *E. The Alleged Refusal to Meet and Bargain Since October 15, 2017 (Consolidated Complaint ¶¶ 25–27)*

The Consolidated Complaint alleges that Arbah has violated Sections 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union since October 15 for a new collective bargaining agreement. Section 8(d) of the Act requires that an employer and a collective bargaining representative meet "at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." A refusal to meet and bargain in good faith violates Sections 8(a)(5) and (1) of the Act.

The record here establishes that Arbah and the Union had their last negotiating session for a new collective-bargaining agreement on August 30. Subsequently, Bokerman wrote to Ruiz requesting dates for additional negotiating sessions on September 27, October 5, October 16, October 27, November 6, November 15, and November 29. Arbah responded only to Bokerman's October 5 email, and never provided any additional dates for bargaining.

Arbah contends that collective bargaining continued in the context of the proceeding Arbah had initiated in the United States District Court for the District of New Jersey to compel the implementation of the new Qual Care health plan. (R.S. Posthearing Br. at 37–39; Tr. 673–676, 691, 707–709.) The evidence establishes that various aspects of the collective bargaining agreement are being addressed during court-ordered settlement discussions in connection with that litigation. However, Michael Farhi, Esq., Arbah's attorney in the federal litigation, represented in correspondence with the Union dated April 11, 2018 that any discussion of the terms of the collective bargaining agreement "have been settlement negotiations to resolve the pending lawsuit and have always been framed that way." (GC Exh. 38.) Farhi further represented that he and his colleague representing Arbah in the lawsuit "have no authority to collectively bargain for a new agreement." (GC Exh. 38.) Given this evidence, I find that whatever discussion of the contract's terms which occurred in the context of the court-ordered settlement negotiations have not constituted collective bargaining after October 15.[28]

For all of the foregoing reasons, I find that since October 15, Arbah has refused to bargain with the Union in violation of

[27] Arbah's contention that the parties were at impasse as of September 8 is rejected for the reasons discussed infra. R.S. Posthearing Br. at 22.

[28] Arbah contends that I erred by refusing to admit Respondent's Exhibit 5, which consists of correspondence regarding the settlement negotiations in the federal litigation. R.S. Posthearing br. at 37–39. At the hearing, the parties discussed the authentication and admissibility of the documents comprising R. Exh. 5, and whether those documents constituted a complete record of the correspondence between the parties regarding the settlement negotiations in the federal case. Tr. 612–635. Because the transcript indicates that I did not rule on the admissibility of R. Exh. 5, I have reviewed the documents it contains, which include Farhi's April 11, 2018 letter, other documents in evidence as GC Exh. 38, and additional correspondence regarding settlement conferences in the federal case. These other documents do not contradict Farhi's assertions in his April 11, 2018 letter that he and his colleague have no authority to negotiate a new collective bargaining agreement on Arbah's behalf.

Sections 8(a)(5) and (1) of the Act.

*F. The Alleged Unilateral Failure to Remit a Health Insurance Coverage Payment to the Fund on or about October 31, 2017 (Consolidated Complaint ¶¶ 28–29)*

The Consolidated Complaint alleges that on or about October 31, Arbah violated Sections 8(a)(5) and (1) of the Act by unilaterally failing and refusing to remit a health insurance coverage payment to the UNITE HERE Health Fund, resulting in the cancelation of health insurance coverage for the bargaining unit employees.

Article XIV of the parties' collective bargaining agreement requires Arbah to remit contributions to the UNITE HERE Health Fund on a monthly basis. It is well-settled that the obligation to contribute to benefit funds is a mandatory subject of bargaining which survives the expiration of a contract. See, e.g., *Church Square Supermarket*, 356 NLRB 1357, 1359 (2011); *Concourse Nursing Home*, 328 NLRB 692, 702 (1999). Thus, such provisions generally cannot be altered without bargaining to impasse, a loss of majority status on the part of the union, or a waiver. *Concourse Nursing Home*, 328 NLRB at 702.

The evidence establishes that on October 20, the Fund sent a notice to Arbah and the Union stating that Arbah was delinquent in its contribution to the UNITE HERE Health Fund for the month of September. (GC Exh. 35.) The Fund's October 20 letter stated that in order to avoid termination of health coverage for the bargaining unit employees, Arbah was required to submit its September report and payment "immediately." (GC Exh. 35.) There is no dispute that Arbah did not do so. Therefore, the Fund terminated coverage for the bargaining unit employees effective November 1.

The record establishes that the parties did not bargain to impasse prior to Arbah's unilateral failure to remit the September contribution to the Fund pursuant to the Fund's October 20 letter. The Board defines an impasse in bargaining as a time during negotiations where "the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope." *Mike-Sell's Potato Chip Co.*, 360 NLRB 131, 139 (2014), enfd. 807 F.3d 318 (D.C. Cir. 2015), citing *Daycon Products Co.*, 357 NLRB 1071, 1081 (2011), enfd. 494 Fed. Appx. 97 (D.C. Cir. 2012). In order to determine whether a valid impasse exists, the Board considers the parties' bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues subject to disagreement, and the parties' contemporaneous understanding regarding the state of the negotiations. Id. The party asserting the existence of a valid impasse bears the burden of proof on the issue. *Mike-Sell's Potato Chip Co.*, 360 NLRB at 139.

The evidence does not establish that the parties were at impasse when Arbah unilaterally failed to remit its September contribution to the Fund in late October. The evidence demonstrates that during the August 30 negotiating session the parties focused on the Qual Care health plan being proposed by Arbah as an alternate to the UNITE HERE Health Fund coverage, with brokers making presentations and answering questions regarding the Qual Care plan's terms. However, when the August 30 session ended, certain information requested by the Union had yet to be provided, specifically the provider network, summary plan description, information regarding the dental and vision elements of the Qual Care plan, and the total cost for the Qual Care plan per employee per month. In her September 8 e-mail to Lorenc regarding the letter Arbah distributed to the employees that day, Bokerman renewed the Union's request for this information again. It is well-settled that "a finding of valid impasse is precluded where the employer has failed to supply requested information relevant to the core issues separating the parties." *Colorado Symphony Association*, 366 NLRB No. 122 at p. 34 (2018), quoting *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1170 (2006). As discussed above, there is no evidence that any of the requested information was provided prior to late October, when Arbah unilaterally failed to remit the required contribution to the Fund. Because Arbah had not yet provided all of the requested information necessary in order to evaluate the Qual Care plan, no valid impasse could have existed as of that time.

Nor do the parties' interactions at the time evince any contemporaneous belief that an impasse existed. When Bokerman spoke to Lorenc in late August and asked Arbah to delay implementation of the Qual Care plan for one month, Lorenc did not indicate that implementation was justified by an impasse between the parties. Lorenc's response to Bokerman's September 8 e-mail discusses Arbah's outstanding wage proposal, without any indication that he considered additional negotiations to be futile. (GC Exh. 34.) As discussed above, Wysocki's September 8 letter to the employees contains a completely different wage proposal based upon anticipated savings from the Qual Care plan, and states "we are proposing to renegotiate our expired contract," with nothing indicating that the parties were at impasse or that Arbah believed continued bargaining was futile. When Bokerman wrote to Ruiz on September 27 and October 5 requesting additional dates for negotiating sessions, Ruiz responded "Mark [Wysocki] is working on our schedules and will provide you with dates upon our availability by the beginning of next week." (GC Exh. 38.) Ruiz did not indicate in any way that Arbah considered further negotiations to be futile or the parties to be at impasse. When Bokerman wrote to Ruiz again requesting dates for bargaining on October 16 and October 27, Arbah simply did not respond. Thus, the parties' interactions from September through late October, when Arbah unilaterally failed to remit its contribution to the Fund, do not evince a belief that an impasse existed or that bargaining had become futile.

For all of the foregoing reasons, I find that Arbah has not satisfied its burden to prove that the parties were at impasse as of late October 2017, when it unilaterally failed to remit its contribution to the UNITE HERE Health Fund for employee health coverage during the month of September.

Arbah also contends that it did not unilaterally cease contributing to the UNITE HERE Health Fund because a February 2012 side letter to the 2011–2015 collective-bargaining agreement permitted it to unilaterally implement an alternative health care plan. The side letter states, in relevant part:

> 3. Should the Hotel find a more affordable health care alternate, the parties agree that the Hotel may change providers, provided such alternative maintains the same if not better level of current benefits, eligibility threshold, and coverage without

employee contributions.

(R.S. Exh. 2, p. 16.) Arbah argues that the Union waived its right to bargain regarding the implementation of an alternative health plan via this language. R.S. Post-Hearing Brief at 32–36. It is well-settled that such a waiver "is not lightly inferred," and must be "clear and unmistakable." *Weyerhaeuser NR Co.*, 366 NLRB No. 169 at p. 3 (2018), citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); see also *Staffco of Brooklyn, LLC*, 364 NLRB No. 102 at p. 2 (2016), enfd. 888 F.3d 1297 (D.C. Cir. 2018). The party asserting that a waiver exists bears the burden to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Weyerhaeuser NR Co.*, 366 NLRB No. 169 at p. 3, quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

The evidence does not establish that the Union waived its right to bargain regarding Arbah's implementation of alternative health coverage via the side letter to the collective bargaining agreement. Paragraph 3 of the side letter did not by its terms permit Arbah to unilaterally implement alternative health coverage, but instead imposed specific limitations on Arbah's prerogative to change health insurance plans. Pursuant to Paragraph 3 of the side letter, Arbah could change providers *only* if the alternate health coverage "maintains the same if not better level of current benefits, eligibility threshold, and coverage without employee contributions." In addition, the side letter requires that "Any and all disputes between the parties regarding the interpretation or application of this Agreement shall be submitted to arbitration pursuant to the CBA." (R.S. Ex. 2.)h The explicit referral of disputes regarding Arbah's potential implementation of an alternate health plan to the contractual grievance and arbitration procedure further indicates that the condition on implementing alternative health coverage is mandatory—and also militates against finding a waiver of the Union's right to bargain. Compare *Omaha World-Herald*, 357 NLRB 1870, 1871 (2011) (language explicitly excluding changes to retirement plan from the contract's grievance and arbitration procedure given plan's applicability to non-bargaining unit employees evidence that the union waived its right to bargain over the issue). I note as well that Paragraph 1 of the side letter, permitting Arbah to forego contractually required wage increases if "Fund contribution rates exceed twenty percent" of the previous year's rates and providing for a reopener, states that the parties will in that event "meet and discuss whether they can *mutually agree* to modify" the collective bargaining agreement. (R.S. Exh. 2) (emphasis added). The parties' requirement that modifications engendered by changes in Fund contribution rates be mutually agreed upon evinces an obligation to bargain, and not merely an informative discussion or explanation of changes to contract terms. See *Tesoro Refining & Marketing Co.*, 360 NLRB 293, 294 (2014) (language requiring "negotiation" and "bargaining" over, as opposed to "discussion" or explanation of, changes to benefit plans, inconsistent with the waiver of a statutory bargaining obligation).

Thus, the side letter here is materially distinct from the language addressed by the Board and the Fifth Circuit in *Mississippi Power Co.*, discussed by Arbah in its Post-Hearing Brief at pages 35–36. *Mississippi Power Co.*, 332 NLRB 530 (2000); *Mississippi Power Co. v. NLRB*, 284 F.3d 605 (2002). In that case, the medical benefits at issue were provided by the employer, and not through a jointly-trusteed benefit fund to which the employer contributed. *Mississippi Power Co.*, 284 F.3d at 608. In a side letter between the parties, the employer agreed that during the term of the collective bargaining agreement it would pay a specified amount or percentage of the cost of each bargaining unit employee's coverage, and a specified percentage of any premium increase. *Mississippi Power Co.*, 332 NLRB at 532; 284 F.3d at 609. The side letter then stated as follows:

> The condition of this obligation by the Company will be an agreement, as evidenced by the Union's acceptance, that the matter of insurance coverage or change in the Company's contribution toward the premium for insurance coverage of its employees shall not be subject to bargaining or a request for bargaining by the Union until the expiration of the [collective bargaining agreement], except by mutual consent.

Id. Thus, in *Mississippi Power Co.*, the union waived its right to bargain regarding "the matter of insurance coverage or change in the Company's contribution toward the premium" during the term of the parties' collective bargaining agreement.[29] *Mississippi Power Co.*, 284 F.3d at 620. Here, by contrast, the explicit condition placed upon Arbah's right to implement alternate health coverage, the requirement of "mutual" agreement with respect to any contract modification as a result of changes in Fund contribution rates, and the incorporation of the contract's grievance and arbitration procedure as a dispute resolution mechanism preclude finding a comprehensive waiver of the Union's right to bargain regarding the implementation of alternate health coverage.

In addition, I find that the February 2012 side letter was effectively superseded by the parties' January 27, 2017 agreement, which requires Arbah to contribute to the Fund at rates the Fund would subsequently determine. The February 2012 side letter addressed only the parties' agreement with respect to issues arising from the ambiguity regarding Fund contribution rates for the contract years of 2013 and 2014, as set forth in its recitations.[30] Thus, the February 2012 side letter sets forth an agreement regarding the parties' prerogatives in light of potential changes in Fund contribution rates for 2013 and 2014, specifically with

[29] The Fifth Circuit's refusal to enforce the relevant portion of the Board's Order hinged upon the alleged unilateral change and the effective term of the side letter. The Board had determined that because the employer's changes to its program of retiree benefits would not take effect until the collective bargaining agreement had expired, the waiver contained in the side letter did not apply even though the change itself was announced during the contract and side letter's term. *Mississippi Power Co.*, 332 NLRB at 532. The Fifth Circuit, by contrast, found that the waiver was effective during the term of the contract regardless of when the changes the employer intended to implement were to take effect. *Mississippi Power Co.*, 284 F.3d at 618–620.

[30] The February 2012 Agreement states, "WHEREAS, UNITE HERE HEALTH (the "Fund") has yet to release its stated contribution rates for 2013 and 2014." R.S. Exh. 2.

respect to wage increases. It does not generally address Fund contributions, wage increases, or the parties' obligations in general after that time. The January 27 agreement, on the other hand, addresses delinquent contributions to the Fund for 2016 and in the future. The first paragraph of the January 27 agreement discusses the payment of delinquent contributions to the Fund for the calendar year 2016. (GC Exh. 12.) The second paragraph states, "The Hotel agrees to make contributions to the Fund pursuant to the terms of the expired CBA at rates determined by the Fund in accordance therewith." Id. Therefore, based upon the language of the respective agreements, I find that the January 27 agreement superseded the February 2012 side letter, and obligated Arbah to make contributions to the Fund at the rates the Fund determined, in the manner specified in Article XIV of the collective bargaining agreement.

Finally, Arbah argues that Wysocki justifiably believed based on past experience that despite the UNITE HERE Health Fund's October 20 letter regarding the termination of coverage, coverage would somehow continue until the latest delinquency was resolved. (R.S. Posthearing Br. at 36–37.) Arbah claims that as a result Wysocki was not aware that coverage through the Fund had terminated until the first day of the instant hearing. Id. However, the language of the October 20 letter regarding a continued failure to pay the September contribution is clear:

> Additionally, if the Fund does not receive the work report or payment for September 2017, the Employer's account will be terminated effective October 31, 2017. Please note if the account is terminated, the employees will no longer be eligible for benefits after date of termination. The Fund's Trustees have determined that if the account is terminated for non-payment, it will not be eligible for reinstatement until the Fund has received an acceptable fully executed agreement. As a result, in order to avoid termination and a gap in your employees' coverage, you must submit your September 2017 report and payment immediately.

(GC Exh. 35) (emphasis in original).[31] Given the language of the Fund's October 20 letter, Arbah's contention that past events somehow lulled Wysocki into believing that Arbah's failure to remit its delinquent September payment would have no consequences is untenable. Furthermore, Lorenc had asserted in past correspondence with the Union that Arbah read the Fund's statements in previous delinquency letters as portending the imminent termination of health insurance coverage for the bargaining unit employees and had acted in accordance with such an interpretation by attempting to obtain alternate health coverage. See General Counsel Exhibit 28, 32.

For all of the foregoing reasons, the evidence establishes that Arbah violated Sections 8(a)(5) and (1) of the Act by unilaterally failing to make a contribution to the UNITE HERE Health Fund in late October 2017, pursuant to the Fund's October 20 letter. The evidence establishes that as a result the Fund terminated coverage for the bargaining unit employees as of November 1, 2017.

[31] In addition, Article XIV, par. 5 of the parties' collective bargaining agreement states, "The parties agree and understand that, if the appropriate welfare contribution rates are not paid, the Trustees of the Fund *may eliminate benefits to otherwise eligible participants* and terminate the Employer's participation pursuant to paragraph I.I. of the Fund's Minimum Standards" (emphasis added).

## CONCLUSIONS OF LAW

1. Arbah violated Section 8(a)(1) of the Act by threatening to unilaterally discontinue the bargaining unit employees' negotiated health insurance benefit coverage if the employees did not sign up for Respondent's new health insurance coverage in its letter dated September 8, 2017.
2. Arbah violated Sections 8(a)(3) and (1) of the Act by discharging Marie Dufort on April 7, 2017, in retaliation for Dufort's support for and activities on behalf of the Union, and to discourage employees from engaging in these activities.
3. Arbah violated Sections 8(a)(5) and (1) of the Act by unilaterally denying the Union's bargaining representative George Padilla access to the facility on or about August 24, 2017.
4. Arbah violated Sections 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with the bargaining unit employees when it issued a letter on September 8, 2017 threatening to discontinue the employees' negotiated health insurance benefit coverage.
5. Arbah violated Sections 8(a)(5) and (1) of the Act by failing and refusing to meet and bargain with the Union as the exclusive collective bargaining representative of the bargaining unit employees since October 15, 2017.
6. Arbah violated Sections 8(a)(5) and (1) of the Act by unilaterally failing and refusing to remit a health insurance coverage payment to the UNITE HERE Health Fund on or about October 31, 2017.
7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Arbah has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Arbah discharged Marie Dufort in retaliation for her union support and activities, and to discourage employees from engaging in these activities, I shall order Respondent to offer Dufort reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Arbah shall also compensate Dufort for her search-for-work and interim employment expenses, likewise with interest compounded daily, regardless of whether those expenses exceed interim earnings, pursuant to *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part, 859 F.3d 23 (D.C. Cir. 2017). Arbah shall also compensate Dufort for the adverse tax consequences, if any, or receiving a lump-sum backpay award, and file a report with the Regional Director allocating the backpay award to the appropriate calendar year, pursuant to *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, Arbah must remove any reference in its files to Dufort's unlawful discharge and notify Dufort in writing

that this has been done and that the discharge will not be used against her in any way.

Having found that Arbah unlawfully unilaterally denied union representative George Padilla access to its premises, I shall order Respondent to rescind that unilateral change, reinstate the status quo ante and to recognize and deal with Padilla as a union representative for the bargaining unit employees. Having found that Arbah unilaterally failed to remit its payment to the UNITE HERE Health Fund for the bargaining unit employees' September 2017 health insurance coverage, I shall order Respondent to make such payment, including any additional amounts due to the Funds pursuant to *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). I shall further order Respondent to reimburse bargaining unit employees for any expenses resulting from its failure to make such payment, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987).

Arbah is further ordered, upon request, to bargain in good faith with the New York Hotel and Motel Trades Council, AFL–CIO, as the exclusive collective bargaining representative of the following appropriate unit of employees:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

Arbah shall put into writing and sign any agreement reached regarding the terms and conditions of employment for the bargaining unit employees.

Arbah will also be ordered to post an appropriate information notice, as described in the attached appendix. This notice shall be posted in Arbah's facility or wherever notices to employees are regularly posted for 60 days without anything obscuring or defacing its contents. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on a intranet or internet site, and/or other electronic means, if Arbah customarily communicates with its employees in such a manner. In the event that, during the pendency of these proceedings, Arbah has gone out of business or closed the facility involved herein, Arbah shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Arbah at any time since April 1, 2017.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

## ORDER

The Respondent, Arbah Hotel Corp. d/b/a Meadowlands View Hotel, North Bergen, New Jersey, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Threatening to unilaterally discontinue the bargaining unit employees' negotiated health insurance benefit coverage if the employees do not sign up for Respondent's new health insurance coverage.

(b) Discharging employees in retaliation for their support for and activities on behalf of New York Hotel and Motel Trades Council, AFL–CIO, or in order to discourage employees from engaging in such activities.

(c) Refusing to meet and bargain in good faith with the Union as the exclusive collective bargaining representative of the employees in the following bargaining unit:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

(d) Unilaterally denying the Union's bargaining representative access to the facility.

(e) Bypassing the Union and dealing directly with the bargaining unit employees.

(f) Unilaterally failing and refusing to remit payment for the bargaining unit employees' health insurance coverage for September 2017 to the UNITE HERE Health Fund.

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer Marie Dufort full reinstatement to her former position, or if that position no longer exists to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Dufort whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, in the manner set forth in the remedy section above.

(c) Make Dufort whole for her reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section above.

(d) Compensate Dufort for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's order.

(f) Within 14 days, remove from its files any reference to the discharge of Marie Dufort, and, within 3 days thereafter, notify Dufort in writing that this has been done and that the discharge will not be used against her in any way.

(g) Rescind and restore the status quo ante with respect to the unlawful unilateral change of denying union representative

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

George Padilla access to Arbah's facility and recognize and deal with Padilla as a union representative for the bargaining unit employees.

(h) Make the contribution for the bargaining unit employees' health coverage for September 2017, including any additional amounts due, to the UNITE HERE Health Fund, which Arbah would have made but for its unlawful unilateral refusal to do so.

(i) Upon request, meet and bargain in good faith with New York Hotel and Motel Trades Council, AFL–CIO as the exclusive collective bargaining representative of the following appropriate bargaining unit of employees, and put into writing and sign any agreement reached regarding the terms and conditions of employment of the bargaining unit employees:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

(j) Within 14 days after service by the Region, post at its facility in North Bergen, New Jersey copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by Arbah's authorized representative, shall be posted by Arbah and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Arbah customarily communicates with its employees by such means. Reasonable steps shall be taken by Arbah to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Arbah has gone out of business or closed the facility, Arbah shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Arbah at the North Bergen, New Jersey facility at any time since April 1, 2017.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to unilaterally discontinue your negotiated health insurance benefit coverage if you did not sign up for our new health insurance coverage.

WE WILL NOT discharge you for supporting a union or engaging in union activity.

WE WILL NOT unilaterally deny union representative George Padilla access to the hotel without notifying the Union and giving it the opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with you concerning changes in your wages, hours, and working conditions.

WE WILL NOT fail or refuse to bargain in good faith with New York Hotel and Motel Trades Council, AFL-CIO as the exclusive collective bargaining representative of the following appropriate bargaining unit of employees:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

WE WILL NOT fail or refuse to timely make any required contributions to the UNITE HERE Health Fund on behalf of eligible unit employees without bargaining with the Union in good faith to an agreement or bona fide impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Marie Dufort full reinstatement to her former position, or if that position no longer exists to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Marie Dufort whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, less any net interim earnings, plus interest.

WE WILL make Marie Dufort whole for her reasonable search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings, and consequential economic harm she may have incurred, plus interest.

WE WILL compensate Marie Dufort for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the of the date that the amount of backpay is fixed by agreement or Board order, a report allocating the backpay award to the appropriate calendar year.

WE WILL within 14 days, remove from our files any reference to the discharge of Marie Dufort, and WE WILL, within 3 days thereafter, notify Dufort in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL recognize and deal with George Padilla as a union representative for the bargaining unit employees.

[33] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make the required contribution to the UNITE HERE Health Fund for the bargaining unit employees' health insurance coverage for September 2017, including any additional amounts due.

WE WILL, upon request, meet and bargain in good faith with New York Hotel and Motel Trades Council, AFL–CIO as the exclusive collective bargaining representative of the following appropriate bargaining unit of employees, and put into writing and sign any agreement reached regarding the terms and conditions of employment of the bargaining unit employees:

> All room attendants, housemen, porters, linen room, drivers, maintenance, cooks, waiter, waitresses, busboys and dishwashers excluding all supervisory personnel.

ARBAH HOTEL CORP. D/B/A MEADOWLANDS VIEW HOTEL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-197658 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.